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THE UNIVERSITY OF ALBERTA

THE ORIGINS AND EVOLUTION OF NON-INTERVENTION IN HISTORICO-LEGAL PERSPECTIVE PRIOR TO 1945

by

ROBERT M. MACLEAN

©

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
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OF MASTER OF LAWS

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Supervisor

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Date 25th May, 1988

ABSTRACT.

Often, it would appear, the norm of conduct in the international sphere is intervention, as opposed to non-intervention. History is replete with examples of one state seeking to acquire control or influence over the behaviour of others by interference in their internal or external affairs.

This is not a contemporary phenomenon, but rather one that has pre-existed the creation of the law of nations itself. Since then, this practice has been variously described as a subject outwith the scope of legal regulation, or, alternatively, as a matter which international law is incapable of effectively regulating.

In the following chapters, an attempt will be made to prove the existence of a rule of international law; one upon which the foundation of the rule of law rests - that states are obliged to respect and adhere to the principle of non-intervention.

By tracing this rule through the period of its inception in the law of nations until the Second World War, it is hoped that a number of objectives may be achieved. Firstly, to ascertain that the prescribed rule of international conduct is non-intervention. Secondly, to prove that through the course of history, the practice of states has, on the whole, conformed to this principle. Finally, to analyse and evaluate the motives and purposes of deviations from this general prescription, and to attempt to

explain why the exceptions to this general rule exist.

It is hoped that the efficacy of this rule, and the international legal system in general, will also be established. The existence of international law is incontrovertible; only its limitations are subject to critical appraisal. In this thesis, it is hoped that the processes and mechanisms through which international law operates will become apparent.

Eventually it is hoped that the reader will appreciate that international law is properly termed a legal order. This is not so because its rules are always enforced, or because deviant behaviour is absent. It is because, in the field of international relations, where the common bonds of universal society are weak, it is self-evident that every state, large or small, has a critical stake in the preservation of order and the mitigation of anarchy.

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Table of Abbreviations

A.J.I.L. American Journal of International Law.

Aust.Yb.I.L. Australian Yearbook of International Law.

B.Y.I.L. British Yearbook of International Law.

Can.Yb.I.L. Canadian Yearbook of International Law.

C.L.P. Current Legal Problems

Col.J.T.L. Columbia Journal of Transnational Law.

Col. L.R. Columbia Law Review.

Hague Recueil. Academie de Droit International: Recueil des Cours.

I.C.L.Q. International and Comparative Law Quarterly.

I.L.M. International Legal Materials.

I.Yb.H.R. Isreal Yearbook of Human Rights.

L.N.T.S. League of Nations Treaty Series.

L.Q.R. Law Quarterly Review.

M.L.R. Modern Law Review.

P.A.S.I.L. American Society of International Law, Proceedings.

R.I.A.A. United Nations Reports of International Arbitral Awards.

T.G.S. Transactions of the Grotius Society.

U.N.T.S. United Nations Treaty Series.

U.T.L.J. University of Toronto Law Journal.

Yb. W.A. Yearbook of World Affairs.

Y.L.J. Yale Law Journal.

I. INTRODUCTION.

The dramatic and violent effects of intervention guarantee widespread coverage in the media. Seldom does it appear that such acts are impeded, and they often serve to demonstrate the impotency and ineptitude of international law. The victor is conferred with the spoils, and the victim yields its independence and dignity. The international community condemns the action, but is too disorganized to punish the law-breaking state. As a result, the popular opinion of international law is denigrated, and somewhat irrational claims are made with regard to its impotency and irrelevance.

Is this really a fair evaluation of the situation? Certainly international law attempts to prohibit unlawful intervention, but if the international community is unwilling to enforce the law against a transgressor, then such acts will continue to go unpunished. The root of the problem is not the system of laws and rules which exist and prevail in international society, but rather it lies in the mechanisms which are absent to enforce obligations. Given this state of affairs, what is the role of international law and the principle of non-intervention in international relations?

The whole fabric of international life rests upon the so-called Grotian system of international law which endows individual sovereign states with a series of rights and duties. The essential element of this prescription is that full liberty of action is conferred upon each independent sovereign state within its own sphere of jurisdiction. The principle of non-intervention is, therefore, a necessary corollary of the doctrine of the equality and independence of states, and must be considered to be a fundamental element of international legal life.

In the Corfu Channel Case[1], the International Court of Justice declared that intervention in the sovereign affairs of states was strictly prohibited. Equally, similar sentiments have been expressed in the 1965 General Assembly Resolution on Non-Intervention and in the 1970 Declaration on the Principles of Friendly Relations Among States. Textbooks continually extoll the virtues of such a rule. But intervention has proven itself to be a persistent phenomenon. Why does this discrepancy exist?

The legal conception of non-intervention, despite its continual restatement in international legal circles, remains an elusive substantive concept. The inherent uncertainties involved in the formulation of a principle which regulates conduct of such a high policy content are self-evident. The use of a single term to characterize the extensive motives for intervention necessarily-implies the inaccuracy of the principle. Interventions are undertaken to perpetuate ideological, political and economical objectives. To attempt to classify such variables within the confines of one principle is extremely difficult.

---

[1] I.C.J. Reports 1949, p.35.

There is no satisfactory consensus even as to the nature of the principle of non-intervention itself. Not only are the doctrinal opinions on this matter confused, but it appears that the practice of states is similarly incoherent. Certain authorities believe that intervention can be defined as any interference whatsoever in the affairs of another state. Others appear to limit the concept to dictatorial interference, but then restrict this definition by qualifying dictatorial interference as being armed force. In addition, certain writers have stated that intervention is limited to the internal affairs of a sovereign state, whilst others assert that intervention is equally possible in external affairs. The only consensus which appears to exist is that this area of law is the subject of a substantial degree of uncertainty.

The essential nature of the non-intervention norm as a doctrinal construct, the lack of certainty regarding the parameters of the concept, and the continual abuse of the principle, have inevitably exacerbated the problem. The present work attempts to identify the source and nature of this principle, prior to 1945, and then comment upon its application in the international order. Consequently, the evolution of non-intervention will be considered against the background of the international decision-making processes, in order to analyse and contrast the principle against the various pretexts commonly advanced for deviation from this rule.

The relevance of the evolution of this principle in contemporary international legal life is somewhat self-evident. An evaluation of the development of the principle should assist in the identification of the causes creating discrepancies between principle and practice. Further, such an examination should also reveal the motives behind the existence of exceptions to the general rule.

Although post-1945 international law has attempted to restrict resort to the use of force, the evolution of the principle of non-intervention embraces a number of further issues, and therefore its origins and development are legitimate subjects for contemporarary legal analysis, and, indeed, offer insight into the functioning of international law.

II. THE INTERACTION BETWEEN LAW AND SOCIETY IN THE INTERNATIONAL SPHERE.

Violations of the non-intervention principle in international law, particularly since 1945, have epitomized the apparent classical defects of the general international legal system. Often, it would appear, powerful or influential nations are at liberty to infringe upon the sovereignty of comparatively less powerful states when they perceive certain interests to be threatened or compromised or, alternatively, where certain long-term strategic advantages are to be consummated. Such determinations are inherently subjective evaluations. To the objective international community at large, and in particular to those not acquainted with the functioning of this legal system, international law would therefore fail to qualify as "law" in the conventional domestic legal sense. Rather, to such observers, international law is commonly characterized as a series of superficial forms and procedures, which are deprived of any effective means of enforcement.[2]

---

[2] See Austin, J. The Province of Jurisprudence Determined (Edited by H.L.A. Hart, 1954), pp.122-125 and Hart, H.L.A. The Concept of Law (1961), pp.18-48. For an analysis of the persistently detrimental comparison between municipal and international law, see Campbell, A.H. "International Law and the Student of Jurisprudence", 1949 (35) T.G.S. pp.113-132; Lauterpacht, H. Private Law Sources and Analogies of International Law (1927); D'Amato, A. "The Relations of Theories of Jurisprudence to International Politics and Law", 1970 (27) Washington and Lee Law Review, pp.257-277 and Henkin, L. How Nations Behave (1968), pp.31-83. For a cogent reasoning that this dispute is, in essence, merely a matter of semantics, see Williams, G. "International Law and the Controversy Concerning the Word "Law"" 1945 (XXII) B.Y.I.L. pp.146-163.

However, in contemporary legal analysis and jurisprudence, this extreme "positivist" attitude has become increasingly anachronistic and simplistic as a valid synthesis of the complexities of international law.[3] It is undeniable that the international legal mechanisms of enforcement are theoretically ineffective in comparison to the popular conception of domestic law enforcement agencies, and that no compulsory processes of adjudication and no legislative mechanisms are identifiable *per se*.[4] But to advance these alleged deficiencies as grounds for denying the efficacy of international law is to fail to comprehend the complexities and subtleties involved in the functioning of the system.

As most informed observers would agree, international law does exercise an element of normative influence upon international political decision-making, and if empirical analysis was feasible, it would demonstrate that the main corpus of international law is generally adhered to by the majority of states.[5] Admittedly, in certain circumstances international law exercises only a mildly coercive influence, but in the majority of cases this has proved sufficient.[6]

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[3] On the development of "positivism" in international law, see Ago, R. "Positive Law and International Law", 1957 (51) A.J.I.L. pp.691-733.
[4] For an evaluation of the enforceability of international law, see Fitzmaurice, G. "The Foundations of the Authority of International Law and the Problem of Enforcement", 1956 (19) M.L.R. pp.1-13 and Brierly, J.L. The Basis of Obligation in International Law (1944), pp.68-80.
[5] Brierly, J.L. The Law of Nations (Sixth edition, Edited by C.H.M. Waldock, 1963), pp.68-71; McDougal, M.S. & Lasswell, H.D. "The Identification and Appraisal of Diverse Systems of Public Order", 1959 (53) A.J.I.L. pp.1-29; McDougal, M.S. & Feliciano, F. Law and Minimum World Public Order (1961); and Brierly, J.L. Outlook for International Law (1944), where, at p.5, the author asserted:
"The best evidence for the existence of

In international legal analysis, the predominant technique for the examination of the relationship of law to political decision-making has changed from earlier and primitive perceptions of abstract structural qualifications, to a focus upon the social processes through which decisions, both national and international, are derived. This approach confers upon the horizontal relations of states, a juridical quality which may be characterized as legal order.[7] The previous "positivist" approach concentrated upon the singular fact of power or authoritative adjudication, which necessarily entailed vertical cohesion. A socio-legal approach will permit the examination of the various competing factors at work in international relations, in order to permit a contrast and comparison with the international legal processes.[8]

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[5] (cont'd) international law is that every actual state recognises that it does exist and that it is itself under an obligation to observe it. States may often violate international law, just as individuals violate municipal law; but no more than individuals do states defend their violations by claiming that they are above the law."

See also Pollock, F, A First Book of Jurisprudence (Fourth edition, 1918), at p.28 and Morgenthau, H. Politics Among Nations (Fourth edition, 1966), pp.263-298.

[6] Bull, H. The Anarchical Society (1977), pp.142-145. See also Glahn, G. von Law Among Nations (Fourth edition, 1976), pp.3-16.

[7] Landherr, B. The Sociology of International Law (1966), pp.27-35; Gould, B.T. & Barkun, M. International Law and the Social Sciences (1970), pp.49-93; and Barkun, M. Law Without Sanctions (1968), pp.59-74.

[8] An early illustration of the essence of this methodology

For the efficacy of international law to be proven, it is no longer necessary to establish a complete and comprehensive pattern of conformity.[9] A comparison of the history of international relations in modern times with the substantive elements of international law would reflect a large measure of adherence, particularly since states are the sole participants in the norm-creation processes of international law, and, therefore, in the vast majority of cases, it is in their own long-term interests to comply with them.[10] Deviance undoubtedly does exist, just as it is present in any human legal structure. Although it is unnecessary to illustrate by examples the continued persuasive influence of this order, it is imperative to investigate the nature of certain anomalous behavioural patterns which can be identified, and to define the parameters of other elements in operation to generate such adverse conduct.

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[8] (cont'd) is given in, Pollock, F. On The Nature of International Law (Oxford Lectures, 1890), at p.18. An analysis of law from the socio-legal perspective is also provided in Schwarzenberger, G. "Civitas Maxima?", 1975 (29) Yb.W.A. pp.337-368, at pp.341-344. See also Starke, J.G. "Elements of the Sociology of International Law", 1965 (1) Aust. Yb.I.L. pp.119-136.

[9] Bull, op. cit. p.136.

[10] See the Lotus Case (France v Turkey) P.C.I.J. Reports, 1927, Series A, No. 10, at p.18. But note also the comments made by Brierly, J.L. in "The Lotus Case", 1928 (44) L.Q.R. pp.154-163, at pp.155-56, where the author, commenting on the decision of the International Court, stated:

> "...their reasoning was based on the highly contentious metaphysical proposition of the extreme positivist school that the law emanates from the free will of sovereign independent states, and from this premise they argued that restrictions on the independence of states cannot be presumed."

Criticism of international law has often not only ignored the persuasive, and often decisive, influence of this body of principles on international decision-making, but also overlooks the fact that this order has regulated a community of sovereign nations which, for the better part of four hundred years, have remained unchallenged as the autonomous and omnipotent authorities within their respective geographical parameters and domestic jurisdictions. Consequently, the determination of the limitations upon international law plausibly lies in the nature of international society itself.[11]

The international community is, however, unlike the common forms or models of domestic societies identified in the continuum of human anthropology. This particular society is composed of subsidiary, and often more comprehensive and advanced, sub-societies, generically termed "sovereign states", and the complement of this society has remained small, never exceeding more than two hundred members.[12] The composition of this community is substantially more heterogeneous than in the case of any other identifiable society of individuals, and, in comparison to their human counterparts, the participants in the international society are virtually perpetual.[13]

---

[11] Those who deny the existence of an international society articulate the proposition that states co-exist in a "state of nature", which, to a certain degree, resembles international anarchy. See Hobbes, T. Leviathin (edited by A.R. Walker, 1904), Chapter 13, and Nardin, T. Law, Society and the Relations of States (1983), pp.34-36 and Levi, W. Law and Politics in International Society (1976), pp.9-35.

[12] For a brief description of the evolution of the global community, see Schwarzenberger, G. Power Politics (Third edition, 1964), pp.27-41.

If it is acknowledged that international law is a weaker normative influence in comparison with the ideal model of a municipal legal order which is so often proffered, then it should be accepted that these two forms of legal order regulate radically different types of societies. As Carr accurately postulated, law can exist only within a social framework. Where there is law there must be a society within which it is operative. He continued:

> "Law is not an abstraction...No political society can exist without law, and law...cannot exist except in a political society...Politics and law are indissolubly intertwined; for the relations of man to man in society which are the subject-matter of the one are the subject-matter of the other."[14]

The maxim *ubi societas ibi jus* correctly identifies that law and society are irrevocably interrelated and mutually interdependent factors.[15]

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[13] Wight, M. Power Politics (Second Edition, 1986), pp.106-107.

[14] Carr, E.H. The Twenty Years' Crisis (1939), pp.227-228 and Schwarzenberger, G. The Frontiers of International Law (1962), pp.21-42.

[15] Westlake, J. Chapters on International Law (1894), p.3: "(T)he maxim *ubi societas ibi jus est* correctly puts before us society and law as mutually dependent. They must have been inseparable as facts from the earliest time at which there was any intercourse between men...Without society no law, without law no society. When we assert that there is such a thing as international law, we assert that there is a society of states: when we recognize that there is a society of states, we recognize that there is international law."
Oppenheim, L. International Law (Eighth edition, Lauterpacht, 1955), Vol. I, Para. 7, pp.11-13.

The import of this equation is not to imbue solace to those attempting to establish that international law is "law properly so-called" through proof of the existence of an international society in the global sphere, but rather to establish the essential connection between law and society.[16] Wight appropriately defined the concept of society when he elaborated:

> "...a society is a number of individuals (or units) joined in a system of relationships for certain common purposes."[17]

Further, according to Wight, it is impossible to deny that there is a society of sovereign states because it cannot be contradicted that there exists a system or order of states, in which nations constantly interact, associate, and conduct relationships with each other within the parameters of mutually and universally acceptable rules, principles and norms.[18]

Since every type of society engenders a legal superstructure which establishes obligations, and confers rights and imposes duties upon its members, international law is only the mirror reflection of the unique nature of the international society, which is characterized by its decentralization, and horizontal division into a multiplicity of interdependent, yet sovereign, states.[19] International law has no alternative but to accommodate these features and deficiencies, and in fact is forced to emulate the limitations of that society.

---

[16] See Brierly, op. cit. pp.41-45.

[17] Wight, op. cit. p.105. Emphasis added. Nardin, op. cit. at pp.34-35 states: "The expression "international society" as it is understood by many writers on international relations refers to the idea of states related to one another in terms of common practices, customs and rules. Such rules provide the basis for making judgments of just and unjust international conduct, for advancing claims concerning respect for rights and the performance of duties, and for seeking vindication and redress when rules are violated, rights infringed, and duties ignored."

[18] Wight, ibid, p.105 and also Starke, loc. cit. pp.122-123, 132-134. For the Soviet perspective on the existence of international society, see Tunkin, G.I. "Co-Existence and International Law", 1958 (95) Hague Recueil pp.52-62.

Further, as Murphy has accurately observed, law is a process of social ordering, whose complexities and capacities vary relative to the maturity of the particular social group.[20] In primitive societies, rules which the legal philosopher, Hart, would describe as "primary rules" predominate, but nevertheless can be considered a viable legal order even in the absence of a sovereign power to enforce specific provisions.[21] As the particular social group matures, it moves beyond this primitive ordering towards a more complex structure of legal order, which is more responsive to the needs of that particular society, and in which, ultimately, the development and administration of the legislative, judicial and executive organs are feasible.[22]

---

[19] See Pettman, R. State and Class (1979), pp.45-71 for a discussion of the competing theories of "structuralism" and "pluralism" in international society. Even Austin admitted that the international community constituted a society. See Austin, op. cit. Lecture VI, Para. 199, pp.200-201.

[20] Murphy, C.P. "Some Reflections Upon Theories Concerning the Nature of Law", 1970 (70) Col. L.R. pp.447-463, at p.451.

[21] Hart, H.L.A. The Concept of Law (1961), pp.77-96.

[22] See Black, D.J. The Behavior of Law (1976), pp.131-132.

Following the logic of this hypothesis, international society, being an essentially primitive society in terms of social structure and evolution, has produced a primitive form of legal order, despite the complex nature of its substantive norms and regulations. The absence of these organs, at the effective level, infers that international society has not yet attained the stage at which such apparatus is technically feasible.[23] Only once the international society is sufficiently fertile and mature for a closer social interaction will international law be sufficiently prepared for the embodiment of the doctrine of the separation of powers at the international level.

Although a society may be primitive, this does not automatically imply that the legal order which has developed is incapable of imposing a certain degree of normative effect on the members of that society. For example, it is not necessary to delve far into the political past of England to observe that the functions of legislative promulgation, judicial determination, and executive action, were united under the absolute administration of the Crown.[24] Analogous and comparative development can be observed in the history of most legal orders. Yet, citizens subject to these systems were under no illusion that these orders constituted valid legal systems, and that the dictates of the sovereign qualified as "law". The gradual separation of executive and legislative functions, the growth of an independent judiciary, and the accompanying rise of democratic institutions, are all indicative of the gradual progression of a particular society.

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[23] The doctrine of the separation of powers is a predominantly western political construct, which jurists of the same persuasion have attempted to identify as a principal criteria of "law". See Smith, J.C. & Weisstub, D.N. The Western Idea of Law (1983), pp.395-467.

[24] Pollock, F. & Maitland, F. The History of English Law (Second edition, 1898), Vol. I, pp.174-178 and Bracton, On the Laws and Customs of England (Translated by S.E. Thorne, 1968), Vol. II, pp.19, 21, 22. See also Kaplan, M. & Katzenbach, N. The Political Foundations of International Law (1961), pp.11-15.

The international community betrays its infantile stage of societal development by the fact that it is almost completely decentralized and remains horizontally structured.[25] This is a natural result given that it is composed of independent and sovereign states which are, by definition, the supreme authorities within their respective territorial boundaries. Consequently, international society is, at present, incapable of sustaining an omnipotent central law-giving organ, nor any form of law-enforcing authority.[26] International law is, therefore, compelled to vacillate between two polar extremes, both decentralized in character, for its efficacy: identical or complementary interests amongst the various states; and the distribution of a semblance of an effective equality of power - a balance of power - among states.

While international society is incontrovertibly primitive, it nevertheless does exist.[27] There are elements permanently at work in the international political community, including trade, commerce, social intercourse, diplomatic relations, the continual functioning of the vast network of international institutions and organizations, conferences, negotiations, and so on.[28] At most times, the vast majority of states live in peace with each other, conduct reciprocal international relations, and enter into agreements which they consider to be binding. Further, international law cannot be said to be completely devoid of common rules of morality, courtesy or decorum.[29] It also appears that, with the progression of history, there is a gradual, but nevertheless perceptible, trend in the growth of the common social bonds which will ultimately strengthen the societal ties between states. This process stems from the increasing social and economic interdependence by states such as exists, for example, in the European Economic Community or the Inter-American regional system.[30] Doubtless an international society is tangible, but although this factor is real, the elements of war, strife and conflict, as well as the existence of transnational loyalties, are simultaneously irrefutable.[31]

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[25] Kelsen, H. Principles of International Law (1952), pp.16-173 and Morgenthau, op. cit. pp.266-269.
[26] See Green, L.C. "Is International Law Law?" in Law and Society (1977), pp.133-182, at pp.147-167.

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[27] Schwarzenberger, G. Power Politics (Third edition, 1964), pp.27-41; Corbett, P.E. Law and Society in the Relations of States (1951), pp.36-67; and Tunkin, loc. cit. pp.51-53. Schwarzenberger, in "Civitas Maxima?" 1975 (29) Yb.W.A. pp.337-368, at p.339, makes the comment:

> "Contemporary world society is the result of a threefold process: disintegration of the European Christian community, expansion of this European society since the sixteenth century into a world society during the periods of colonialism and imperialism, and concentration of power in a decreasing number of great and world powers."

[28] On the relationship between law and order in organized international society, see Schwarzenberger, G. "Law, Order and Legitimation", 1970 (23) C.L.P. pp.240-263, at pp.249-258. For an appraisal of the international organizational structure, see Jacobsen, H. Networks of Global Interdependence (1979). See also Jessup. P. A Modern Law of Nations (1968), pp.1-14 and Leonard, L.L. International Organizations (1951).

[29] Akehurst, M. An Introduction to the Modern Law of Nations (Fifth edition, 1984), pp.3-5 and Nardin, op. cit. pp.223-224.

Since international law is a function of the political community of nations, then the perceived alleged technical deficiencies or shortcomings of this order can be attributed to the relationship between this order and the embryonic character of the community in which it operates. The characteristic feature of international society - the horizontal structure of authority - has devolved a decentralized system of law. Since states throughout history have been unwilling to cede effective authority to establish anything but the most crude, and often superficial, attributes of legal authority, this has only to be anticipated.[32] Those factors perpetuating this unwillingness to devolve sovereign authority have ranged from insecurity, ambition, power differentials, ideological differences, to cultural heterogenity.[33]

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[30] Friedmann, W. The Changing Structure of International Law (1964), pp.152-187.

[31] Pettman, op. cit. pp.59-66, gives a description of transnational loyalties. See also Jessup, P.C. Transnational Law (1956), pp.1-34.

[32] Corbett, P.E. Law in Diplomacy (1959), pp.273-274.

[33] Kaplan & Katzenbach, op. cit. pp.30-55.

Despite these limitations, international law still performs to a substantial degree of efficacy within the international society.[34] One of the fundamental elements of the system of international law is the concept of sovereignty itself. Sovereignty is an essential concept of the international system, as are the derivative rights of legal equality and territorial integrity.[35] Further, simply stated, the concept of a society of states necessarily implies a number of important corollaries, one of which is the right of each individual state to be immune from the unwarranted scrutiny and interference of other states as regards its internal and domestic concerns. The duty of non-intervention is essentially the negative statement of a positive obligation. Consequently, widespread violations of this duty would strike at the very roots of the international legal system. The observation of these primary rules forms the foundation of the basis for the maintenance of order in the international community, and implicit in this is the principle of non-interference in the domestic or international concerns of one state by another, in the absence of sufficient pretext.[36]

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[34] See Murphy, loc. cit. pp.448-449.

[35] Schwarzenberger, G. "International *Jus Cogens*?", 1964-65 (43) Texas Law Review, pp.455-478, at p.458 where the author denies that sovereignty constitutes a *jus cogens*.

[36] See General Assembly Resolution 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence, 14th January, 1966, I.L.M. 1966, Vol. 5, pp.374-376, and General Assembly Resolution 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, 24th October, 1970, I.L.M. 1970, Vol. 9, pp.1292-1297. On the general effect of General

Since 1945 the principle of non-intervention has acquired an ironic significance in international relations. Within the last forty years the phenomenon of "war", in the traditional and legal sense of the term, has declined in relation to the instances of intervention which have proliferated. During the last three centuries prior to this event, armed conflicts were essentially manifestations of war, such as the Napoleonic Wars, the Crimean War, the three Prussian Wars, the Balkan Wars and the two tragic World Wars. However, within the last four decades the vast majority of military confrontations have been characterized as acts of "intervention", either in civil conflicts, or under the expansive pretext of self-defence. The increasing prevalence towards intervention is the result of a number of factors, including the proliferation of transnational ideologies, and the conflicts resulting therefrom, the existence of strategic global policies necessarily entailing nuclear retaliation, the shrinkage of the globe, and the resultant polarity of international relations which has resulted in the coexistence of two, mutually antagonistic, superpowers.[37] Intervention has been substituted for direct

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[36](cont'd) Assembly resolutions, see Johnson, D.H.N. "The Effect of Resolutions of the General Assembly of the United Nations", 1955-56 (32) *B.Y.I.L.* pp.97-122 and Kim, J.G. & Howell, J.M. *Conflict of International Obligatons and State Interests* (1972), pp.19-30. For the background to Resoluion 2131(XX) see O'Connell, D.P. *International Law* (Second edition, 1970), pp.313-315 and on the nature of the non-intervention principle in the 1970 Declaration, see MacDonald, R.St.J. "The Nicaragua Case: New Answers to Old Questions", 1986 (24) *Can. Yb.I.L.* pp.127-160, at pp.133-135.

[37] For an examination of "intervention" in the context of

confrontation, and the phenomenon of proxy conflict has been perpetuated against the spheres of influence scenario.

The problems presented by non-intervention illustrate the conflicting priorities and factors at work in international decision-making. In the light of the comparative profanation of this concept the essence of this principle is called into issue, and conceivably it should be recognized that the limits of international law have been reached by the attempt to regulate intervention. Perhaps international jurists have been too willing to accept the legitimacy of this principle as an *a priori* deduction from the nature of sovereignty. Certainly, it is apparent that international law has difficulties in the construction and enforcement of this obligation.[38]

The institution of the international society necessarily implies the existence of a political community of states. It is self-evident that international law is merely one variable competing with a variety of other, primarily political, factors in the international

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[37](cont'd) superpower polarity, see Windsor, P. "Superpower Intervention" in Bull, H. Intervention in World Politics (1984), pp.45-65.

[38] Noel, J. Le Principe De Non-Intervention: Theorie et Practique Dans Les Relations Inter-Americaines (1981), pp.221-222 and Carty, A. The Decay of International Law? (1986), pp.36-37. For consideration of the same problem in a wider context, see Schwarzenberger, G. "The Misery and Grandeur of International Law", 1964 (17) C.L.P. pp.184-210, in which this distinguished jurist considers the problems raised in attempting to apply rules of international law to a number of international problems, including Apartheid, the Cuban missile crisis, and the Nuclear Test-Ban Agreement of 1963.

decision-making process.[39] The conduct of states is unquestionably influenced by a variety of other factors, including perceived "vital interests", national interests, power, ideological and political ambitions and motivations, and even occasionally morality.[40] The normative effect of international law is, crudely speaking, the resolution of these factors relative to international conduct.[41] Further, it should be acknowledged that international law does not invariably prove to prevail in this competition.[42]

Thus, legal obligations are invariably subject to the reservations of necessity, vital interests, or whatever guise the alleged right of auto-interpretative self-preservation assumes.[43] This problem is further aggravated by the lack of effective and rapid means to institute peaceful change within the international society.

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[39] Carr, op. cit. pp.227-231. See also Schwarzenberger, G. Power Politics, pp.160-226.

[40] See Higgins, R. Conflict of Interests: International Law in a Divided World (1965) and McDougal, M.S. "International Law, Power and Policy: A Contemporary Conception", 1953 (82) Hague Recueil pp.137-258.

[41] See Falk, R.A. "Law, Lawyers and the Conduct of American Foreign Relations", 1968-69 Y.L.J. pp.919-934, at pp.924-932.

[42] Carr, op. cit. pp.219-222.

[43] For example, former U.S. Secretary of State, Dean Acheson, dismissed the importance of law in matters of high policy in the following terms:

> "I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position and prestige of the United States has been challenged by another state; and law simply does not deal with questions of ultimate power - power that comes close to the sources of sovereignty."

From, 1963 (57) P.A.S.I.L. pp.13-15, at p.14. Consideration of the concept of "vital interests"is given in Brierly, J.L. The Outlook for International Law (1944), pp.33-45.

Indeed, since the use of force has been regulated, there appears to exists a form of lacuna in the mechanisms of international relations to facilitate change in the international *status quo*.[44] If change or revolution in international society is either desirable of necessary, then the threat or use of force to maintain the *status quo* may be morally more culpable than the use of force to alter it, although international law may only sanction the employment of force in a very limited number of circumstances. This situation is accentuated by the absence of legislative mechanisms in international relations to permit peaceful change.

There is much in the history of interstate relations which supports the proposition that, in areas of high policy content, the influence of international law is minimal.[45] Indeed, it may be so that certain disputes are not suitable for international adjudication, and are, therefore, internationally non-justiciable.[46] However, the converse of this proposition is equally true, and in those areas in which states observe mutual or reciprocal self-interest, and in which political influence is neutral, then legal settlement is most likely and plausible. Such resolution is feasible since there exists no controversial political determinates influencing these rules, and also because decisive determination is usually considered in the mutual interests of the states concerned.[47]

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[44] As one commentator has observed:

> "War does not always arise from mere wickedness or folly. It sometimes arises from mere growth and movement. Humanity will not stand still."

Murray, G. The League of Nations and the Democratic Idea (1932), p.16.

[45] See, for example, Brownlie, I. "Certain Aspects of the Legality of Nuclear Weapons", 1965 (14) I.C.L.Q. pp.437-451, at p.437.

[46] See Sohn, L.B. "Exclusion of Political Disputes From Judicial Settlement", 1944 (38) A.J.I.L. p.694; Williams, J.F. "Justiciable and Other Disputes", 1932 (26) A.J.I.L. pp.31-36; and Lauterpacht, H. The Function of Law in the International Community (1933).

When a nation is confronted with the decision of intervention, abstention or appeasement, political considerations are important, but the influence of international law has not been proven to be negligible. However, the practice of states illustrates that in such situations the law tends to become obscure, confused or uncertain. This is a bi-product of the interaction of political and legal rationales.

By tracing the evolution of the non-intervention norm in the early stages of its development in legal thought and state practice, the mutual interaction of law and politics becomes evident. This process highlights a number of anomalies between the prescribed rules and the practice of states. Further, the incorporation of exceptions to the main body of this principle assists in explaining the degree to which international law is malleable to the ebb and sway of international political relations. Therefore, a number of objectives are to be achieved by the synthesis of this particular principle, including comment on the fundamental nature of the international legal order itself.

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[47] See Friedman, W. "The Reality of International Law - A Reappraisal", 1971 (10) Col. J.T.L. pp.46-60, at pp.51-60. In this article, the author describes two forms of international law: hard and soft. Hard international law is composed of those parts of law for which the "reciprocity of national interest" ensures observance. An illustration of this form of law would be the rules for the navigation of the high seas or the exploration of outer space. Soft international law is essentially composed of those areas of law in which this reciprocity is absent, and the principal example of the rules in this category is the law relating to the unilateral use of force by individual states.

III. THE FOUNDATION AND EVOLUTION OF THE LEGAL PRINCIPLE OF SOVEREIGNTY.

Historically, legally and theoretically, the evolution and subsequent development of the legal principle which prohibits indiscriminate and unrestricted interference in the external or internal affairs of independent powers originated in the genesis, and subsequent interpretation by legal scholars, of the concept of sovereignty and in the derivative international rights of the equality and independence of all states. As the International Court of Justice has explicitly observed:

> "The existence in the *opinio juris* of States of the practice of non-intervention is backed by established practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States."[48]

The doctrine of the legal equality and independence of sovereign states presupposes full liberty of action by each sovereign state within its jurisdiction,. and non-interference in the internal or external affairs of other sovereign entities limited only by the rights of other states under international law.[49]

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[48] Nicaragua v United States (Merits), I.C.J. Reports (1986), p.1, at p.106.

[49] Starke, J.G. An Introduction to International Law (Sixth edition, 1967), at p.94, comments:

> "[T]he sovereignty of a State means the residuum of power which it possesses within the confines laid down by international law".

See also Hershey, A.S. Essentials of International Public Law (1921), p.148 and Baker, S. First Steps in International Law (1899), Chapter IV, Para. 2, p.37.

The rules emanating from sovereignty, as well as the concept itself, are principally based on customary international law.[50] In the words of Judges Anzilotti and Huber in the Wimbledon Case, in 1923, the rights flowing from sovereignty are predicated on "generally accepted usage".[51] Consequently, the development of the non-intervention principle also has been based upon customary law. The link between sovereignty and non-intervention evolved as a fundamental tenet in the reciprocal relations between states. In theory, respect for one norm was synonymous with respect for the other, and recognition of one implied tacit acknowledgment of the other. Although trespasses and violations of this principle have not been infrequent, it has remained part and parcel of customary international law.

From the historical perspective, the principle of sovereignty was a consequence of a number of political factors which existed in Medieval European society.[52] These heterogeneous elements precipitated the dissipation of the pre-existing rigidly hierarchical and archaic societal structure of feudalism which had prevailed, whilst simultaneously announcing the dawn of a new and enlightened political age.[53]

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[50] Nicaragua v United States (Jurisdiction), I.C.J. Reports (1984), p.391, at p.424. In recognizing the customary nature of the principle of non-intervention, the Court continued:

> "The fact that the above-mentioned principles recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention [etc]...continue to be binding as part of customary international law, despite the operation of the provisions of conventional law in which they have been incorporated."

[51] Wimbledon Case (1923) P.C.I.J. Reports, Series A, No. 1, p.25, at p.36.

[52] Communities resembling quasi-sovereign entities did exist prior to this European development. However, for the purpose

The legal concept of sovereignty in the law of nations was, in effect, the product of the creation and subsequent articulation of the phenomenon of the "nation state" as a political artifact. This particular political concept was originally manifested in Europe around the thirteenth and fourteenth centuries as feudalism was everywhere in retreat, having been thoroughly discredited by perpetual internecine conflict.[54] Although national unity was only slowly to be defined, territorial unification gradually pervaded as the common policy of the multiplicity of diverse political overlords which prevailed throughout this period. The physical possession and the semblance of legal imperium over areas of territory were the natural foundation for the fermentation of nationalist sentiment.[55] In the

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[52](cont'd) of this discourse of the non-intervention norm, the evolution of sovereignty in its modern form can be taken to have commenced at this period. See Hinsley, F.H. Sovereignty (1966), pp.27-44 and pp.45-60, for a description of the concept of sovereignty in the Hellenistic monarchies and in the Roman Empire. Sovereignty in antiquity and in the middle ages is also described in Kleffens, E.N. van "Sovereignty in International Law", 1953 (82) Hague Recueil pp.13-39.

[53] The interaction and influence of feudalism on the law of nature is described in Ward, R. An Enquiry into the Foundation and History of the Law of Nations in Europe (1795), Vol. I, Chapter XII, pp.337-395.

[54] See Kleffens, loc. cit. pp.40-56.

[55] See De Visscher, C. Theory and Reality in Public International Law (Translated by Corbett, 1968), pp.3-8.

incorporation of the embryonic pluralist structure of international society at this time, the territorial principle was to play an orchestrating role in the displacement of the incumbent prevailing Medieval universalist system. The substitution of stable political power within the parameters of an identifiable territorial unit was the catalyst in the formulation of nationalist perceptions and ideas, whilst simultaneously forging a unique and innovative political institution. Out of this common sense of national identity was to grow the emotions of unity which have become the essential criteria which define the internal constitution of the modern nation state.[56]

Another important development at this period was the disassociation from the theory which identified law as essentially a customary order of rules and procedures. The recognition of the existence of a supreme, omnipotent and indivisible authority, co-ordinate with the territorial parameters of the nation, the decisive feature of which was its virtually unfettered discretion to promulgate legislative enactments, was ultimately transposed for this primitive conception. This advanced description of the nature of legal order precipitated the capacity of, predominantly monarchical, legislative organs to erase the obsolete customary legal order in favour of the rule of law founded upon absolute legislative discretion, and executive control, usually embodied within the same physical person.[57]

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[56] De Visscher, ibid, pp.16-19.

The political philosopher, Bodin (1530-1596), is generally accredited with the introduction and original elaboration of the political doctrine of sovereignty[58], although the concept had previously existed in an inchoate form in the earlier political history of Europe. Recognition of the full implications and connotations of this principle had been inhibited and circumscribed by the authority of the Pope in spiritual matters and the control of the Emperor in materialistic concerns. Imperial authority, however, had been seriously adversely affected as a consequence of the Great Interregnum (1254-1273) on the one hand, and the rise of independent or quasi-independent communities in Italy and the national states in England, Spain and France, on the other. The Great Schism in the Church (1378-1417) and the rise of sects, ultimately culminating in the Reformation, correspondingly weakened the authority of the Pope.[59]

In the signature of the Peace of Westphalia in 1648, by which the Emperor acknowledged restrictions in his dominion in favour of the territorial autonomy of the various political units which had previously composed the Empire, challenges to the grant of independent co-existence for the multitude of fledgling nation states could no longer credibly be sustained.[60] By evaluating historical events in the European political arena and hypothesizing upon contemporary political developments, Bodin was able to describe sovereignty as the "absolute and perpetual power" which was subordinate only to divine ordinance and the law of nature.[61] Such authority existed legally *in vacuo*, completely uninhibited by positive mortal power.[62] This authority was readily and universally acknowledged within European society as the optimum vehicle for the achievement of order within the borders of a nation. Since it assisted in the realization of order from the near anarchic state of chaos which contemporaneously co-existed in Europe, the theory of sovereignty was well received at this period.

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[57] Hinsley, op. cit. pp.100-125.

[58] See generally, Gardot, A. "Jean Bodin, Sa Place Parmi Les Fondateurs du Droit International", 1934 (50) Hague Recueil, pp.549-743. Also Simons, W. The Evolution of International Public Law Since Grotius (1931), pp.11-22.

[59] Gross, L. "The Peace of Westphalia, 1648-1948", in Essays on International Law and Organization (1984), pp.3-21, at p.12.

From the perspective of the law of nations, the Peace of Westphalia represented a portal from the Old World, which had stifled and aborted all attempts to construct a credible legal order in international society, into a new era which potentially permitted legal regulation. The pre-existing era had been characterized by a hierarchical conception of the relationship between the various political communities on the one hand, and the Emperor on the other hand. In the political field the pact represented and symbolized the dereliction of the primitive hierarchical societal structure in favour of the more complex system, defined by the co-existence of a multiplicity of sovereign states, each autonomous, omnipotent within its territory, and theoretically equal to each other. This regenerated international system was founded upon the twin pillars of the law of nations and the delicate, precarious balance of power; a law operating between rather than above states and a power operating between rather than above states.[63]

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[60] Schwarzenberger, G. The Frontiers of International Law (1962), pp.43-51.
[61] Bodin, J. Six Books of the Commonwealth (Translation by Tooley, 1955), pp.25-36, at p.25.
[62] Gardot, loc. cit. pp.623-628. See also, Brierly, J.L. The Law of Nations (1928), pp.4-9.

The Peace of Westphalia consisted of a number of instruments prepared at the congresses of Catholic and Protestant representatives which had convened at Munster and Osnabruck between 1644 and 1648.[64] The treaties, which marked the end of the Thirty Years' War, recognized the equality of the Catholic and Lutheran Confessions in Germany, and the independence and political equality of the nations of western Christendom. Between Catholic and Protestant States, the principle of "*aequalitas exacta mutuaque*" was postulated in religious matters. This equality was defined "*ita ut quod uni parti justum est alteri quoque sit justum.*"[65] Secular states, ecclesiastical states, republics and free cities all were entitled to proclaim their equality and autonomy. Henceforth, the governing bodies of these various entities claimed for themselves the ultimate authority as law-givers and arbitrators within their respective territories. The concept of political sovereignty had started down the path towards legal sovereignty.

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[63] Gross, op. cit, pp.10-11.

[64] Consolidated Treaty Series, 1648-1649, Vol. 1, pp.119-356. See Weinschel, H. "The Doctrine of the Equality of States and its Recent Modifications", 1951 (45) A.J.I.L. pp.417-442, at pp.417-418.

[65] Schwarzenberger, G. "The Fundamental Principles of International Law", 1955 (87) Hague Recueil pp.222-223.

The political principle of sovereignty was adopted into the law of nations as one of the principal tenets of this emergent social science. In the writings of the so-called founders of modern international law, the concept of sovereignty played a fundamental role. Through subsequent interpretations by jurists, sovereignty became synonymous with the unrestricted authority of each autonomous unit to independently organize its internal political constitution and its population, whilst exercising within its parameters a monopoly of legitimate physical coercion to enforce its sovereign will.[66] So conceptualized, sovereignty was capable of encompassing any national political system: centralized or decentralized; parliamentary or presidential; democratic, autocratic, plutocratic, or monarchical. Any defined territorial entity with an ascertained and permanent populace, exercising effective unsubordinated control, potentially qualified for the mantle of sovereignty[67] , subject only to the doctrine of recognition, which played a lesser role in this era than in nineteenth and twentieth century international law.[68]

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[66] The ultimate positivist conception of the doctrine of sovereignty was rendered in the work of the English philosopher Austin. See Austin, J. The Province of Jurisprudence Determined (1832), Chapters V and VI. For a critique of this hypothesis, from the domestic legal perspective, see Hart, H.L.A. The Concept of Law (1961), pp.49-76.

[67] The subsequent effect of this doctrine was discussed in early nineteenth century jurisprudence. In particular, see Cherokee Nation v Georgia, U.S. Supreme Court, 1831, 5 Peters, p.1, and Yrissarri v Clement, Common Pleas, 1825, 2 Carrington and Payne, Nisi Prius, p.223, in which, in the

Through the application of legal scholarship, the concept of sovereignty was transformed into a legal doctrine, entailing legal consequences. This crystallization into substantive legal doctrine was possible once the eradication of the hierarchical societal structure had been achieved. After the principle of sovereignty had coalesced in international legal doctrine, the peripheral rights and duties flowing from the concept were gradually realized. More precisely, through the works of Grotius (1583-1645), Hobbes (1588-1679), Pufendorf (1632-1694), Wolff (1676-1756) and Vattel (1714-1767), the legal corollaries of the

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[67] (cont'd) latter case, the court stated:

> "If a foreign state is recognized by [the United Kingdom], it is not necessary to prove that it is an existing state; but if it is not so recognized, such proof becomes necessary...I take the rule to be this...[I]f a body of persons assemble together to protect themselves, and support their own independence, and make laws, and have courts of justice, that is evidence of their being a state..."

In modern international law, the criteria for the creation of statehood are generally recognized to be as provided in the Montevideo Convention on Rights and Duties of States, 1933, 165 L.N.T.S. p.19, Article 1.

[68] The lesser role of recognition in the earlier law of nations is commented upon in Crawford, J. The Creation of States in International Law (1979), at pp.5-10. The modern view on recognition is given in Oppenheim, L. International Law (Eighth edition, Lauterpacht, 1955), Vol. I, Para. 71, at p.125, where the author stated:

> "A State is, and becomes, an International Person through recognition only and exclusively".

See also Recognition of New States and New Governments, Resolution of the Institute of international Law, Brussels, April, 1936, which is reproduced in 1936 (30) A.J.I.L. Supplement, at p.185.

equality and independence of nations were adduced and corroborated from the principle of sovereignty.[69]

Grotius is commonly acknowledged as instigating the notion of the law of nations as an order of rules applicable to the interactions and mutual relations of sovereign entities.[70] He identified as the sovereign authority:

> "...that power...whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will..."[71]

Further, he subsequently acknowledged that the quintessential subject of sovereignty was the state.[72] However, he did not conceive of sovereignty as connotating state equality, either expressly or by necessary implication, and, indeed, several elements in his work suggest that Grotius would have repudiated the principle of sovereign state equality.[73] The Eurocentric international society to which Grotius was accustomed was not founded upon an equal capacity for rights among its participants. He believed that important limitations upon the exercise of political power were consistent with the enjoyment of international personality and even sovereignty under his scheme of the law of nations, and, therefore, he recognized the existence of a heterogeneous society among whose members there existed a variety of different status, accompanied by differing degrees of capacity.

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[69] See Twiss, T. The Law of Nations (Second edition, 1884), Introduction, pp.xvii-xliii. See also Nussbaum, A. A Concise History of the Law of Nations (1954), pp.86-163.

[70] Oppenheim, L. International Law (Eighth edition, 1955), Vol. I, Paras 43-50, pp.84-86. On the modern relevance of classical writers in general, and Grotius in particular, see Oppenheim's comments in "The Science of International Law: Its Task and Method", 1908 (2) A.J.I.L. pp.313-356, at pp.315-318, 327-330.

[71] Grotius, H. De Jure Belli Ac Pacis Libri Tres (1625), Classics of International Law (Translated by F.W. Kelsey, 1923), Bk. I, Chapter III, Para. VIII(3), p.102.

[72] Grotius, ibid, Bk. I, Chapter III, Para. VIII(3), p.103.

[73] See Dickinson, E.D. The Equality of States in International Law (1920), pp.34-35. Indeed, see Noel-Baker, in his article entitled "The Doctrine of the Legal Equality of States", 1923-24 (IV) B.Y.I.L. pp.1-20, at p.6, where the author asserted that it is a mistake to accredit Grotius with the creation of the legal doctrine of the equality of states.

Although he did not write a substantive treatise on the law of nations, the philosopher Hobbes had a profound influence on the development of the law of nations in general, and the elaboration of sovereignty in particular. This political commentator described mankind as existing in a state of nature in which, in the absence of a sovereign power, there existed no coercive order, no institutional hierarchy, and no law but natural law.[74] Given such a scenario, each individual man was conferred with an equal right of self-preservation which necessarily implied a natural right to undertake all action necessary for that purpose. Each individual man was the supreme arbiter in that cause and he denied the existence of societal bonds, instead maintaining that mankind existed in a state of perpetual and absolute conflict.[75]

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[74] See Hobbes, T. Leviathan (1651), Edited by A.R. Walker, Chapter 13, pp.81-86.

[75] See Bull, H. The Anarchical Society (1977), pp.46-51.

Sovereignty was therefore represented in terms of supreme and unlimited political power.[76] From the perspective of the citizen, the sovereign's will and judgments were law, and therefore, effectively, the efforts by Grotius to restrict the sovereign by legal rules of the law of nations were circumvented.

In relation to nations, Hobbes merely substituted states into the state of nature paradigm which he had described as prevailing upon mankind. Thus states, once instituted, "do put on the personal properties of men"[77] and, amongst themselves, states existed in a natural condition analogous to a state of nature. Therefore, the same law:

> "...which speaking of the duty of single men we call natural, being applied to whole cities and nations, is called the right of nations. And the same elements of natural law and right, which have hitherto been spoken of, being transferred to whole cities and nations, may be taken for the elements of the laws and right of nations."[78]

The law of nature and the law of nations were, therefore, equated.[79] This being the case, then the law of nations was an abstraction except where its rules were approximated to the law of nature, and since Hobbes alleged that states lived in a state of nature, he directly refuted the existence of a society of states.[80]

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[76] See Dickinson, op. cit. pp.69-75.

[77] Hobbes, T. in The English Works of Thomas Hobbes (edited by W. Molesworth, 1839-1845), Vol. II, p.186.

[78] Hobbes, ibid, Vol. II, p.186.

[79] This assimilation continued for a considerable period of time. Indeed, when writing his work entitled The Institutes of the Law of Nations, the jurist James Lorimer was Regius Professor of the Law of Nature and Nations, which was a single chair, at the University of Edinburgh in Great Britain. For a background into the circumstances resulting

Although Hobbes refuted the law of nations as formulated earlier by Grotius, his description of international relations between states as a continuous condition of conflict abetted the effective dissipation of the prior prevalent conception of international society as a community of mankind, a *societas humanis*, or as a universalist paradigm. In the articulation of this premise, it was implicit that sovereign states were necessarily equal, despite the nature of this anarchical society. This equality was not juridical, but rather the result of the assimilation of states to the predicament of individual men in a state of nature. Consequently, and indirectly, Hobbes' depiction of international society was an essential progression in the construction of the legal tenet of sovereign equality, which was a necessary prerequisite in the formulation of any norm of law regulating the interventionary activities of states.

The essential transposition of the principle of equality into the law of nations was undertaken by

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[79](cont'd) in this situation, see Lorimer, J. "The Story of the Chair of Public Law in the University of Edinburgh", in Studies, National and International (1890), pp.243-253. See also, Campbell, A.H. "International Law and the Student of Jurisprudence", 1949 (35) T.G.S. pp.113-132, at p.113.

[80] Bull, op. cit. p.25.

Pufendorf.[81] In contradistinction to Hobbes, this jurist conceived in the approximate physical equality of men a factor which was "...more likely to restrain the will to do harm than to urge it on...For...neither gains as much from victory as the one loses who is killed."[82] This natural equality of men inhibited the perpetuation of an antagonistic state of nature. Since this state of nature was normally one of peace, and because men were rational beings, then the dictates of reason guided them to the formation of political societies. Therefore the law of nature prevailed in a state of nature and operated to compel men to honour their obligations.

Similarly reasoning *a priori*, he described the juxtaposition between men in a state of nature and nations in a similar condition. The principle of equality, therefore, applied to the relations between states in the same fashion as to the interactions of men. Since nations were merely composed of men in a particular formal structure, and since natural law was applicable to the totality of relationships of men amongst themselves, then, by naturalist deduction, natural law must prevail in the relations between states. The principle of equality was therefore conferred with a juristic quality as an imperative which both men and nations, as mere assemblages of men, ought to observe in their relations with each other.[83]

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[81] See Noel-Baker, loc. cit. pp.6-7.

[82] Pufendorf, S. De Jure Naturae Et Gentium Libri Octo (1672), Classics of International Law (Translated by C.H. Oldfather, 1964), Bk. II, Chapter II, Section 8, p.170.

Wolff adopted the proposition of the equality of states, and aimed at amplifying the rationale behind this sentiment by attempting to consolidate the content of this putative principle. The simplicity of his reasoning and argument is betrayed when he stated:

> "By nature all nations are equal the one to the other. For nations are considered as individual free persons living in a state of nature. Therefore, since by nature all men are equal, all nations too are by nature equal the one to the other."[84]

Having established the authenticity of the principle of equality at the outset of his work, he pursued the principle to its natural conclusion. Wolff described the implications of equality in the following passage, stating:

> "[S]overeignty, as it exists in a people or originally in a nation, is absolute...Therefore by nature no nation can have the right to perform any act which belongs to the exercise of the sovereignty of another nation."[85]

Although this passage made no overt reference to the deduction of a rule prohibiting interference in the affairs of nations, it did hint at the plausibility of the subsequent creation of such a principle. From the legal equality of states, Wolff formulated several corollaries, including the statement of a right of nations to organize their sovereign affairs free from the influence and coercion of other states, which was tantamount to the statement of a right to independence. Sovereignty conferred upon states the absolute right to co-exist in an order which prohibited interference by other states in their internal affairs. This freedom extended to the exercise of all rights consistent with sovereignty, as understood at this period.

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[83] Pufendorf, ibid, Bk. II, Chapter III, Section 23, pp.226-229. See also McNair, A.D. "Equality in International Law", 1927 (26) Michigan Law Review, pp.131-152, at pp.132-135.

[84] Wolff, C. Jus Gentium Methodo Scientifica Pertractatum, Classics of International Law (Translated by J.H. Drake, 1964), Prolegomena, Para. 16, p.15.

[85] Wolff, ibid, Chapter II, Para. 225, p.130.

Vattel elected to adopt this scheme into his work which was of particular influence in the early nineteenth century. He reiterated the rationale behind the principle, and continued:

> "Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom."[86]

In this passage the international legal principle of equality was clearly elaborated. The technique of naturalist deduction is also self-evident, as is the influence of antecedent jurists. However this statement represents the final conclusion of over a century of philosophic and legal academic deduction on the principle of sovereignty.

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[86] Vattel, E. de. The Law of Nations (1758), Classics of International Law (Translated by G.D. Gregory, 1916), Introduction, Para. 18, p.7.

By the mid-eighteenth century the concept of sovereignty had evolved from a vague political doctrine into a fundamental substantive legal tenet, endorsed in the writings of most authoritative jurists. This principle conferred basic legal rights and obligations upon states in the labyrinth of legal relationships which regulated their intercourse. In particular, sovereignty came to imply that states, by their qualification as sovereign entities, were universally and arbitrarily endowed with the twin rights of equality and independence.[87] Since international doctrine had determined that all states were juridically equal, it naturally followed that all states were also entitled to autonomous self-determination.

The logical converse of this proposition was that no state was permitted by law to vitiate such a right in the absence of a threat to its own legitimate interests. Therefore, almost inevitably, the next stage would be the erection and elaboration of a norm prohibiting or severely restricting and curtailing unlimited and unjustified interference in the domestic affairs of nations. Hence the seed of the principle of non-intervention had been sown in the international plane as a direct result of sovereignty.[88]

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[87] See the The Antelope, U.S. Supreme Court, 1825, 10 Wheaton, p.66, in which Chief Justice Marshall stated:

> "No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one [state] can rightfully impose a rule on another."

The legal implications derived from sovereignty did not terminate with the demise of naturalist reasoning and philosophy, although the interpretation of the concept was not as dramatic in the "positivist" nineteenth century as in earlier times. This was due to the decline in the influence of individual writers in the face of increasing state participation in the international norm-creating process and the lesser role played by natural law. The contribution of positivist legal jurisprudence was predominantly restricted to the synthesis of state practice, against the background of the framework established by jurists of the previous era and the principles deduced from naturalist processes. Radical expansion of the principle was imperceptible, consolidation and sober reflection being substituted for originality.[89] However, such a result was only natural in the light of the limitations which positivists imposed upon themselves by the techniques of their particular science.

One important development from the positivist era was the realization of the dual nature of sovereignty in international law.[90] The division of sovereignty into internal and external dimensions automatically implied complementary implications for the concept of non-intervention. This bifurcation was elaborated in a number of important works of the nineteenth century, but an early, and significant, illustration of this was provided by Wheaton, who observed:

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[88] See Thomas, C. New States, Sovereignty and Intervention (1985), pp.3-4.

[89] Vincent, R.J. Non-Intervention and International Order (1974), pp.31-39. See also Kooijmans, P.H. The Doctrine of the Legal Equality of States (1964), pp.126-151.

[90] Schwarzenberger, G. Power Politics (Third edition, 1964), pp.84-94. See also Butler, G. "Sovereignty and the League of Nations", 1920-21 (1) B.Y.I.L. pp.35-44.

> "Sovereignty...may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people of any State, or is vested in its rule, by its municipal constitution of fundamental laws. External sovereignty consists in the independence of one political society in respect of all other political societies."[91]

This division of capacity has been voluminously reiterated in a number of works of this period, and the theme still prevails in twentieth century international law.[92]

In the Island of Palmas Arbitration, in 1928, Umpire Huber elaborated the following succinct definition of internal sovereignty:

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise

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[91] Wheaton, H. Elements of International Law (Eighth edition, by Dana, 1866), Part I, Para. 20.

[92] Lawrence, T.J. Principles of International Law (Seventh edition, by Winfield, 1920), at p.48, and Westlake, J. International Law (1904), Vol. I, pp.20-21. A description of the consequences of this division relative to non-intervention is given in Hall, W.E. A Treatise on International Law (Eighth edition, by Higgins, 1924), Part II, Chapter VIII, Para. 88, p.337.

> therein, to the exclusion of any other State, the functions of a State."[93]

Internal sovereignty, therefore, had come to signify the autonomous administration of a nation's constitutional affairs.

In his Separate Opinion delivered in the Austro-German Customs Union Case, in 1931, Judge Anzilotti described external sovereignty in these classical terms:

> "Independence...is really no more than the normal condition of states according to international law; it may also be described as sovereignty (supreme potestas) or external sovereignty, by which is meant that the state has over it no other authority than that of international law."[94]

External sovereignty had, by 1931, assumed the role of the natural and normal condition of states in international society. The ultimate expression of external sovereignty was later underscored by Judge Anzilotti in the above case when he continued:

> "Every country is free to renounce its independence and even its existence".[95]

Sovereignty, therefore, was not inalienable, and the ultimate expression of this right was the capacity of a state to renounce its very existence.[96]

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[93] Netherlands v United States (1928) 2 R.I.A.A. p.829, at p.838.

[94] Advisory Opinion (1931), P.C.I.J. Reports, Series A/B No.41, p.34, at p.57.

[95] Austro-German Customs Union Case, ibid, at p.59.

[96] Schwarzenberger, G. "International *Jus Cogens*?", 1964-65

However the Permanent Court did prescribe the limits of authority of a sovereign state vis-a-vis other sovereign states, in the Lotus Case in 1927, when it stated:

> "The first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another States."[97]

Each of these steps represented the progression towards the definition of the concept of sovereignty prior to the Second World War, and which, in many respects, has remained unchanged in contemporary law. Throughout the evolution of sovereignty, the non-intervention norm has developed in parallel. However, more profoundly, the legal precept of sovereignty has had a critical and profound impact on the essential nature of international law itself.[98] In pre-1945 international law, the legal significance of sovereignty was irrefutable and it had become an essential and cardinal

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[96](cont'd) (43) Texas Law Review, pp.455-478, at p.458. The positive rights of sovereign states are examplified by the Declaration of the Rights and Duties of Nations, adopted by the American Institute of International Law, 1916, in 1916 (10) A.J.I.L. pp.124-126.

[97] (1927) P.C.I.J. Reports, Series A, No. 9, p.3, at pp.18-19. See Underhill v Hernandez, U.S. Supreme Court, 1897, U.S.Rep. Vol. 168, p.250, in which Chief Justice Fuller stated: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

[98] Increasingly in the post-1945 era, sovereign states are no longer seen as the sole objects of international law. See Lauterpacht, H. "The Subjects of the Law of Nations", 1947 (63) L.Q.R. pp.438-460, and 1948 (64) L.Q.R. pp.97-119. See also the Reparations for Injury Case (1949), Advisory Opinion, I.C.J. Reports (1949), p.174.

element in international legal regulation.[99]

Although the architects of the United Nations Charter incorporated the legal principle of sovereignty as a fundamental Principle of the Organization, and professed it to be "based on the principle of the sovereign equality of all its Members", this provision had been previously embodied in earlier instruments. In the Final Act of Vienna which established the Germanic Confederation of 1820, Article 1 provided "the Germanic Confederation is a union according to international law of the Sovereign Princes and Free Towns of Germany for the preservation of the independence and inviolability of the States comprised in it and for maintaining the internal and external security of Germany."[100] Article 10 of the Covenant of the League of Nations also demanded that members "respect and preserve as against external aggression the territorial integrity and existing political independence of all the members of the League." The principle of sovereignty has also been reiterated in a number of constitutional instruments of subsequent international organizations.[101] Although it may be inaccurate to classify sovereignty as a *jus cogens* of international law the Permanent Court did characterize the principle as a "fundamental principle of international law"[102] , while its successor declared that "between independent States, respect for territorial sovereignty is an essential foundation of international relations".[103]

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[99] Oppenheim underscored the essential role of sovereignty in international law when he stated:

> "Recognition of a State as a member of the community of nations involves recognition of such State's equality, dignity, independence, and territorial and personal supremacy...All these qualities constitute as a body the international personality of a State, and international personality may therefore be said to be the fact, involved in the very membership of the community of nations, that equality, dignity, independence, and personal supremacy, and the responsibility of every State is recognised by every other State."

Oppenheim, L. International Law (Eighth edition, Lauterpacht, 1955), Vol. I, Para. 113, pp.261-262.

[100] Consolidated Treaty Series, 1820-1821, Vol. 71, p.110. Translated in Schwarzenberger, loc. cit. p.223.

The development of the legal doctrine of sovereignty has played a critical and decisive role, not only in the evolution of the norm of non-intervention, but also in the formulation of modern international law. The realization of the law of nations as a regulatory body prevailing over sovereign states permitted the elucidation of the concomitant rights of equality and independence. Accompanying these rights was the recognition of the right of a sovereign state to enjoy a virtually unfettered and absolute freedom to conduct its affairs, circumscribed only by the reciprocal and positive rights of other states.[104] Since international law viewed as abhorrent the forcible alienation of equality and independence, the converse of these duties was the right to enjoy freedom from the threat of, or actual, deprivation of these rights. Therefore, the fundamental nature of the non-intervention norm was contingently related to this principle, and the limitations of the norm prescribed by reference to the principle. As a result, the nature of the non-intervention norm will always be subject to the parameters of sovereignty as it exists in international legal relations.

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[101] Organizations which have incorporated a similar provision include the Organization of American States (OAS), the Arab League and the Organization of African Unity (OAU). See, Peaslee, A. International Governmental Organizations (Third edition, 1974), Vol. 2, p.1116, and p.1184.

[102] Eastern Carelia Case, Advisory Opinion (1923), P.C.I.J. Reports, Series B, No. 5, p.27. Schwarzenberger, loc. cit. p.226.

[103] Corfu Channel Case (Merits) I.C.J. Reports (1949), p.4 at p.35.

[104] See Levi, L. International Law (1888), pp.79-87.

IV. THE DOCTRINAL ORIGINS OF THE NON-INTERVENTION NORM.

In comparison to most domestic legal orders, the role of legal doctrine in the development and formulation of international law has been particularly pronounced.[105] Although in different historical periods this influence has varied, it has remained substantially true that the contribution of legal writers in the sixteenth and seventeenth centuries has earned them a place as institutional writers insofar as their works are cited as early authority for legal propositions.[106] These early commentators were largely responsible for the establishment of the fabric of the law of nations, but, in the light of the lack of emphasis on state practices in these periods, these early commentators exercised a substantially more creative role in the identification of the particular rules than is true in contemporary jurisprudence.[107]

Naturalist philosophy, unquestionably the most ancient school of analytic thought having permeated throughout time in the works of Aristotle, Cicero, Justinian, and St. Thomas Acquinas[108], was the predominant theme of legal reasoning at the particular historical period when international law was progressing through what has generally been accepted as its most profound transformation and evolution in the seventeenth century. Natural law was pre-eminent in the writings of those jurists assisting in the birth of the legal regulatory framework. Such scholars as Vitoria, Suarez and Gentili all founded their writings on the infrastructure of natural law.[109] This particular philosophic methodology scrutinized mankind's relationship to nature through the processes of *a priori* deductions, questioning what the content of man's obligations towards each other "ought" to be, in contrast to the consideration of the physical nexus between cause and effect. Naturalist philosophy advocated that the content of any legal order could only be ascertained through the application of human deduction and reason. During the seventeenth century, when international law was crystalizing into the rudimentary form which preceded contemporary international law, natural law was conceived of as a body of rules inherent in the essence of man.[110]

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[105] Parry, C. The Sources and Evidences of International Law (1965), pp.103-105 and Wolfke, K. Custom in Present International Law (1964), pp.79-80. See also Nardin, T. Law, Morality and the Relations of States (1983), at pp.158-186, where the author argues that scholarly writers assist in the authoritative determination of the rules of international law, in the absence of effective procedures for rule identification. On the methodology and impact of early commentators, see Kennedy, D. "Primitive Legal Scholarship", 1986 (27) Harvard International Law Journal pp.1-98.

[106] See The Renard (1778) Hay & M. p.222, and Lauterpacht, H. Collected Papers (1970), Vol. I, pp.249-256.

[107] A description of the conditions in history which gave rise to the impact of the classsical writers is given in Dickinson, E.D. "Changing Concepts and the Doctrine of Incorporation", 1932 (26) A.J.I.L. pp.239-260, at pp.239-242.

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[108] See Heron, D.C. The History of Jurisprudence (1860), pp.172-185; pp.193-209; and pp.215-235; Corbett, P.E. Law and Society in the Relations of States (1951), pp.17-35; and Maine, H.S. Ancient Law (Third edition, 1861), pp.98-113. For a discussion of the naturalist approach of St. Thomas Aquinas, see Midgley, E.B.F. The Natural Law Tradition and the Theory of International Relations (1975), pp.1-55.

[109] Gentili, A. De Jure Belli Libri Tres (1612), Classics of International Law (Translated by J.C. Rolfe, 1933), Bk. I, Chapter I, Para. 13, pp.9-10 and Scott, J.B. The Spanish Origin of International Law, Francisco de Vitoria and the Law of Nations (1934), pp.163-172. See Nussbaum, A. A Concise History of the Law of Nations (1954), pp.58-85, and Van Der Molen, G.H.J. Alberico Gentili and the Development of International Law (Second edition, 1968), pp.114-116.

Grotius, often considered as the initiator of the modern system of international law, believed that the totality of interstate relations was regulated by the legal superstructure of the law of nations.[111] He perceived the interactions of states as subject both to the law of nations and the law of nature.[112] The law of nations, or the *jus gentium voluntarium*, was the product of the consent of nations, as manifested in their physical practices. This conception of *jus gentium* was not synonymous with public international law, although it was distinguished from municipal law, or the *jus civile*, which emanated as the product of domestic legal orders. Moreover, *jus gentium* embraced all forms of law - public and private, international or otherwise - which had received the sanction of the preponderant practice of states.[113] Consequently, the *jus gentium voluntarium* was perceived as a component element of the law of nature, but not the complete structure.[114]

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[110] As Roscoe Pound observed:

> "International law was born of juristic speculation and became a reality because that speculation gave men something by which to make and shape international legal institutions and a belief that they could make and shape them effectively"

Pound, R. "Philosophical Theory and International Law", in Bibliotheca Visseriana, Vol. I, pp.71-90, at p.88.

[111] Brierly, J.L. The Law of Nations (1928), pp.18-27. See also Midgley, op. cit. pp.137-166.

[112] Grotius, H. De Jure Belli Ac Pacis Libris Tres (1625), Classics of International Law (Translated by F.W. Kelsey, 1923), Bk. I, Chapter III, Para. XVI (I), p.121.

[113] Grotius, ibid, Bk. I, Chapter I, Para. XIV, pp.44-45.

In De Jure Belli Ac Pacis Libri Tres the significance of natural law was twofold. Firstly, natural law provided a source of principles with which to supplement the lacunae in the consensual law of nations. The second purpose of natural law in this treatise was to provide a standard for adjudicating the adequacy of the law of nations in the light of morality, ethics and reason.[115] The particular perception of natural law from which Grotius derived his substantive principles was predicated upon his belief that man was a social animal, motivated not only by the desire for social security, but also characterized as an altruistic, moral and virtuous creature. Man was not conceived as a selfish animal, for among the qualities with which he was endowed was an *appetitus societas*, which was a desire for a social structure composed of his own kind.[116] The desire to preserve this society was a motivation and source for natural law, which he subsequently identified as:

> "...the dictates of right reason, which points out that an act, accordingly as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity..."[117]

However, although in this work the right of sovereignty was construed as the focus of independence in the light of the Peace of Westphalia, this was not accompanied by its predictable and logical corollary: a principle of non-interference to support respect for that sovereignty. Indeed, as Winfield pointed out[118] , the continued influence of feudalism even after the Peace of Westphalia, was often presented as the assertion of a right of interference based on the divisions and subdivisions of European society.

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[114] Walker, T.A. A History of the Law of Nations (1899), Vol. 1, pp.285-287.
[115] Lauterpacht, H. "The Grotian Tradition in International Law", 1946 (XXIII) B.Y.I.L. pp.1-53, at pp.21-24.
[116] Brierly, op. cit. at p.22.
[117] Grotius, op. cit. Bk. I, Chapter I, Para. X, pp.38-39. See also Dickinson, loc. cit. pp.242-243.

But, Grotius, and subsequently Hobbes and Pufendorf, can only be generally ascribed with contributing to the establishment of the non-intervention norm in so far as they furnished the theoretical structure which underpins international law. By their respective contributions, these scholars developed the popular perception of the law of nations as a scheme regulating the relations of sovereign states.[119] While Grotius formulated the law of nations as a body of rules pertaining to international relations, Hobbes and Pufendorf assisted in the articulation of the natural and juristic equality and independence of sovereign nations.

In common with his predecessors, and many of his successors contemplating the nature of this legal order, Grotius was unable to differentiate the concept of limited interference as a distinct classification, intermediate between war and peace.[120] Thus, writing prior to this jurist, Vitoria had earlier illustrated this restricted vision when he observed that interference was permissible "in favour of those who are oppressed and suffer wrong; and for such a purpose the Spaniards can make war"[121] Although *ex facie* this appeared to be a reference to intervention, it was in fact an attempt to justify this cause as legitimating recourse to war, in the legal and technical sense. Nor could this be construed as a reference to the modern concept of "humanitarian intervention".[122] Vitoria did not advocate a principle of limited interference, but rather asserted the legitimacy of war waged under these circumstances. This was the self-evident consequence of his restricted interpretation of the legal and political relationship of war.

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[118] Winfield. P.H. "Intervention in International Law" 1922 (III) B.Y.I.L. pp.130-149, at pp.133-134.

[119] Vincent, R.J. Non-Intervention and International Order (1974), pp.22-26.

[120] Winfield, loc. cit. p.132. See also Thomas, A.V.W. & Thomas, A.J. Non-Intervention (1956), at p.5.

Any limited act of a violent disposition against the territorial integrity of a state, termed "intervention" in contemporary terminology, was therefore construed by Grotius as an act of war, which justified the appropriate military response in the law of nations. In this context he proclaimed, reiterating Cicero, "*Inter bellum et pacem nihil est medium.*"[123] For him, any act of interference was simply construed as an absence of peace resulting in the relationship of war, which entailed substantial legal connotations.

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[121] Quoted from Scott, op. cit. p.284.
[122] Vitoria appears to have proposed that such oppression could provide a *jus belli*, or a just ground upon which to wage war. See text, below, pp.199-204.
[123] Grotius, op. cit. Bk. III, Chapter XXI, Para. I, p.832.

However, incongruously, notwithstanding his incapacity to perceive such a general principle, Grotius was cognisant of the concept of "humanitarian intervention", although not under this nomenclature, and as confined to his rudimentary rubric description of interstate relations vacillating between the polars of war and peace. Consequently, such action was characterized as "just" when undertaken in the defence of severely oppressed subjects of another state. In this context he observed:

> "The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishment not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever..."[124]

And he continued:

> "The final and most wide-reaching cause for undertaking war on behalf of others is the mutual tie of kinship among men, which of itself affords sufficient ground for rendering assistance."[125]

The authority cited for this proposition was the threatened intervention by Constantine against the Persians should the latter not desist in their persecution of the Christians on account of religion.[126]

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[124] Grotius, op. cit. Bk. II, Chapter XX, Para. XL(1), p.504.

[125] Grotius, op. cit. Bk. II, Chapter XXV, Para. VI, p.582.

He openly acknowledged that sovereigns had the right to wage war on account of atrocities contrary to the law of nature, regardless of the nationality of the subjects of abuse. Since all sovereigns were required to observe the law of nations, and the law of nature, then they were also obliged to observe and punish such deviations. The law of nations imposed obligations which transcended geographical and national demarcation, and which were levied upon individual men.[127]

Pufendorf advocated the passive co-existence of sovereign nations, which could only be abrogated in the light of justifiable reasons for waging war. Legitimate causes for the exercise of force were solely perceived in terms of "justice".[128] Since Pufendorf restricted the use of force to the above categories, he was similarly incapable of conceiving of limited interference.

But again he sympathized with the protection of non-nationals, stemming from the "common duties of humanity", although he was not prepared to concede this right to the same degree as Grotius. Notwithstanding the fact that he did not advance that a sovereign could interfere for this purpose in the domestic jurisdiction of another sovereign, he did assert:

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[126] Grotius, op. cit. Bk. II, Chapter XXV, Para. VIII, p.583.

[127] See Green, L.C. "Institutional Protection of Human Rights", 1986 (16) I.Y.H.R. pp.69-102, at pp.69-70.

[128] In this context, this jurist stated:

> "The just causes for which war can be undertaken reduce themselves to these: that we may preserve and protect ourselves and our belongings against the unjust invasion of others; or that we may assert our claim for an injury already inflicted, or a guarantee for the future. A war waged for the first cause is called defensive, if for other causes, offensive."

Pufendorf, S. De Officio Hominis Et Civis Libri Duo (1682), Classics of International Law (Translated by F.G. Moore, 1927), Bk II, Chapter XVI, Sec. 2, p.138.

> "...if an absolute prince should assume a mind utterly hostile towards his subjects, and openly seek their destruction without the pretence of a cause which has at least the appearance of justice, his subjects can rightly employ against him the means customarily used against an enemy, for the sake of defending their own safety...(but) we cannot lawfully undertake the defence of another's subjects, for any other reason than they themselves can rightfully advance, for taking up arms to protect themselves against the barbarous savagery of their superior."[129]

He recognized that the law of nature imposed certain rights upon men, but did not concede the duty of a sovereign to assist, and succour, a people in extreme distress.

The antecedent to the principle of non-intervention was initially formulated, in an abstract and embryonic form, by Wolff and Vattel, but this concept was still not synonymous with the form which the mature principle later adopted.[130] Wolff also espoused Pufendorf's principle of natural equality, and further postulated that all sovereigns were juridically equal and independent. If the sovereignty vested in each individual state was capable of expression in terms of independence, then in the absence of a legitimate cause, no nation could interfere in the domestic affairs of others since this would be tantamount to a denial of sovereign freedom. Therefore, he rationalized:

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[129] Pufendorf, S. Elementorum Jurisprudentia Universalis (1672), Classics of International Law Translated by W.A. Oldfather, 1927), Obs. V, Sections 21-22, pp.292-293.

[130] Winfield, loc. cit. pp.132-138.

> "To interfere in the government of another, in whatever way indeed that may be done, is opposed to the natural liberty of nations, by virtue of which one nation is altogether independent of the will of other nations in its actions."[131]

If such intrusion occurred, then this would have to be justified by reference to the existence of a positive title. Although a less powerful nation could be compelled to submit to the more powerful, nevertheless might conferred no right which the latter did not derive from any other source.[132]

Wolff expressed the fundamental rights of all sovereign entities to equality, sovereignty, liberty and independence, which had ultimately resulted from the Peace of Westphalia, and the general duty of non-interference was a negative statement of a positive obligation. However, more significantly, this prohibition was the ultimate result of naturalist reasoning upon a variety of abstract deductions, and not a statement of the actual physical practice of states. This statement was a prescription of how sovereigns ought to act, and not an observation or analysis of international political behaviour. Therefore, although subsequent positivists would attempt to justify the principle in terms of state practice, its origins lay in the abstract deductions of naturalist jurists.[133]

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[131] Wolff, C. Jus Gentium Methodo Scientifica Pertractatum (1734), Classics of International Law (Translated by J.H. Drake, 1934), Chapter I, Para. 256, p.131.
[132] Wolff, ibid, Chapter I, Para. 257, p.131.

Despite this important factor, Wolff had proceeded one step further than his predecessors by establishing a category of acts, classified as interference which, although not specifically defined, existed when one state obstructed or impeded the sovereign rights of other. Notwithstanding that this conduct was considered by Wolff as delictual, the response to such an act still remained the right to resort to war. Such interference amounted to an act of war, and was thereby differentiated from the twentieth century concept of intervention as a limited act of violence which falls short of an act of war.

However this particular jurist was not absolutely intolerant of interference by foreign states given certain circumstances and where other considerations were perceived as paramount. He asserted as a legitimate cause for interference circumstances in which collective interference was necessitated to enforce certain standards of conduct within his conception of the *civitas maxima*. In this context he observed:

"In the supreme state the nations as a whole have a

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[133] Thomas, C. New States, Sovereignty and Intervention (1985), pp.9-13.

> right to coerce the individual nations, if they should be unwilling to perform their obligations, or show themselves to be negligent in it."[134]

Collective interference was, therefore, sanctioned where a state attempted to evade its obligations imposed by the general law of nations.

The other grounds which justified such interference were conferred upon individual sovereigns. Where an international delict had resulted, Wolff permitted forcible redress should adequate compensation not be forthcoming.[135] He also adhered to the view that the survival of the state was the ultimate prerogative of any sovereign, and that nations were permitted to take action when its interests were genuinely believed to be adversely affected. More specifically:

> "Every nation is bound to preserve itself...Furthermore, it is self-evident that this obligation cannot be satisfied, either on the part of the individual or of the whole, unless the union in a state should persist, [and] consequently, since the preservation of the nation depends on this union, unless the nation should be preserved. Therefore every nation is bound to preserve itself."[136]

Although these justifications permitted interference by one sovereign in the affairs of another, the means for redress was the waging of a just war. Indeed, in the latter case, the ambit of the response approximates to no more than self-defence in modern international law.

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[134] Wolff, op. cit. Prolegomena, Para. 13, p.14.
[135] Wolff, op. cit. Chapter I, Para. 572, p.292.
[136] Wolff, op. cit. Chapter 1, Para. 31, pp.22-23.

In contrast to Grotius and Pufendorf, Wolff appeared oblivious to the principle regarding the protection of non-nationals. In ignoring these precedents, he impliedly excluded such violations of the law of nature from the ambit of the law of nations, instead confining these to the realm of sovereign domestic jurisdiction. When such abuses of human rights were manifest and obscene, it was merely conceded that another sovereign might "intercede":

> "...for no ruler of a state has the right to interfere in the government of another, nor is this a matter subject to his judgement."[137]

Thus, the sole remedy available in the situation of widespread abuse of human rights under natural law was that a sovereign was permitted to plead the case for the observation of the rights of these citizens. Recourse to armed force by a second sovereign was strictly prohibited.

Although the legal strictures of Vattel were predominantly based upon the earlier writings of Wolff in a substantial number of respects, the completeness of Vattel's work has ascribed him a place in the annals of the history of classical international writers. From the perspective of the principle of non-intervention, many consider this author the source of the concept.[138]

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[137] Wolff, op. cit. Chapter I, Para. 258, p.132.

The cornerstone of Vattel's conception of the law of nations was his belief in the absolute freedom and independence of sovereign states. Since all members of the international community were free and independent, a cardinal rule of that society was that "each nation should be left to the peaceable enjoyment of that liberty which belongs to it by nature."[139] If the independence of a nation was the right conferred by the law of nations, then the duty of non-interference was the converse of this obligation. Therefore he concluded:

> "...all such matters are of purely national concern, and no foreign power has any right to interfere otherwise than by its good offices, unless it is requested to do so or be led to do so by special reason. To intermeddle in the domestic affairs of another Nation or to undertake to constrain its councils is to do it an injury."[140]

In matters of purely domestic concern, no foreign or alien nation was permitted the right to interfere in the legitimate exercise of the free will of a sovereign. This principle was subsequently reinforced by this author when he provided:

> "It clearly follows from the liberty and

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[138] For example, see Vincent, op. cit. at pp.26-27.
[139] Vattel, E. de. The Law of Nations (1758), Classics of International Law (Translated by C.G. Fenwick, 1916), Introduction, Para. 15, p.6 and Para. 21, p.7.
[140] Vattel, ibid, Bk. I, Chapter III, Para. 37, p.19.

> independence of Nations that each has the right to govern itself as it thinks proper, and that no one of them has the least right to interfere in the government of another. Of all the rights possessed by a Nation that of sovereignty is doubtless the most important, and the one which others should most carefully respect if they are desirous not to give cause for offence."[141]

For Vattel, the principle of non-interference, or "non-intermeddling", was an inherent attribute of the sovereignty of a state. By so characterizing each instance of interference, regardless of its degree, Vattel failed to identify the essential nature of the concept of intervention. Only once the classification of each act of interference as an act of war was obliterated, would the path be free for defining lesser acts of violence as intervention.

Vattel absolved sovereigns from the rigorous application of the principle of non-interference when two sets of circumstances existed. In the situation where a civil conflict was in progress, as distinct from being fomented, then a sovereign could support the "just" party in the conflict.[142] However, action prior to the existence of civil hostilities, such as in the form of "humanitarian assistance", was prohibited. Thus Vattel prescribed:

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[141] Vattel, ibid, Bk. II, Chapter IV, Para. 54, p.131.

[142] Winfield, P.H. "The History of Intervention in International Law" 1922-23 (III) B.Y.I.L. pp.130-149, at pp.136-137.

> "No foreign State may inquire into the manner in which a sovereign rules...If he..treats [his subjects] with severity it is for the Nation to take action; no foreign State is called on to amend his conduct and to force him to follow a wiser and juster course."[143]

However, should internecine conflict evolve, and

> "...if a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him...[then]...any foreign power may rightfully give assistance to an oppressed people who ask for aid."[144]

Two preconditions, therefore, existed for such assistance: the actual existence of internal strife, and a request for assistance from one of the belligerent parties. The rationale for the creation of this exception to the general rule was the recognition by Vattel of the vulnerability of states caught in such a predicament in the eyes of unscrupulous neighbours. The facts of international life at this time rendered impossible the denunciation of such a classification. This compromise to state practice pre-empted the spectre of the influence of positivist philosophy in the forthcoming decades.

The influence of state practice upon Vattel was also reflected in his second cause for legitimate interference.

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[143] Vattel, ibid, Bk. II, Chapter IV, Para. 55, p.131.
[144] Vattel, ibid, Bk. II, Chapter IV, Para. 56, p.131. This statement of law was directly criticized in Halleck, H.W. International Law (1861), Chapter III, Para. 20, p.73.

In acknowledging pragmatic international relations, Vattel conceded the existence of the political phenomenon of balance of power. Since the potency of this doctrine could not be ignored, Vattel accommodated such action, and provided:

> "The safest plan...is either to weaken one who upsets the balance of power, as soon as a favourable opportunity can be found when we can do so with justice, or, by the use of all upright means, to prevent him from attaining so formidable a degree of power."[145]

This appears to be the first exposition of the contentious plausibility of legitimate action in this manner, and was subsequently adopted into a number of legal works as a debatable ground for sovereign violation. The motive for the statement of this exception to the general rule appears to derived from the principle of self-preservation. However, no state was justified in preventing the lawful acquisition of territory or power by another, unless such increments directly and immediately adversely affected its own interests.[146]

By implication, the jurists of this school concurred in the general prohibition of incursions or intrusions in sovereignty. But the terms "interference" or "meddling", would only represent a concept other than the strict division between "war" and "peace" until the decades subsequent to the Treaty of Vienna in 1815, almost a half century after Vattel elaborated his hypothesis. Naturalist scholars were fatally inhibited by their perception of international relations as they existed in their contemporary international society.

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[145] Vattel, ibid, Bk. III, Chapter III, Para. 49, pp.251-252.
[146] See text below, pp.194-199.

Accepting these limitations, Vattel's attempt to conceive of the general rule can be construed as laudable. The development of the complete ramifications and implications of the doctrine would only result after the subsequent attention given by later scholars who elaborated upon the doctrine in the light of actual state practice, although adopting the original framework created by naturalist jurists.

Given the collective authority of these jurists, it remains difficult to reconcile the European state practices of the seventeenth and eighteenth centuries with these statements of the law of nations.[147] While the concept of non-intervention derived by these early international jurists was not absolute, this formulation of the concept is of particular importance. In the tradition of naturalist philosophy, these authors had ultimately derived the authority of this rule through the application of reason.

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[147] Carty, A. The Decay of International Law? (1986), pp.89-90. As Winfield commented on the principle of non-intervention:

> "Was it remarkable that this rule, the pillar upon which the whole fabric of international law rests, should require some reasssertion when national policy was so frequently pursued to the prejudice of international rights? And if the cavalier fashion in which the rule was treated urged Vattel to insist more earnestly upon it, its frequent infractions afforded equal reason for its restatement by those who followed him."

Winfield, loc. cit. p.133.

V. THE STATEMENT OF THE PRINCIPLE OF NON-INTERVENTION IN THE WORKS OF EARLY NINETEENTH CENTURY JURISTS.

The "positivist" school of philosophy was the antipode of the naturalist tradition. In common with its predecessor, this school was not singularly delimited to the appraisal of the phenomenon of law, but was rather a general theoretical process which assisted in the evaluation of particular social interactions, including the operation of the law of nations, based predominantly upon the re-emergence of the dialectic technique. This particular method of examination and dissection searched for the essential nature and structural composition of social phenomenon through the application of scientific and analytic analysis.

Those jurists who asserted this philosophy maintained, not only the existence of a positive law of nations as a consequence of customary and treaty practice, but also that this prevailed over the natural law of nations, the existence and heritage of which many actually denied. Although exercising a nominal influence in the seventeenth and early eighteenth centuries, their time came in the late eighteenth century.[148]

In common with many scientific and philosophic deliberations at this period, international law was subjected to the rigours of this form of examination.

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[148] The growing influence of the positivist school was, however, quite gradual. See Rubin, A.P. "De Jure Naturae et Gentium", 1962 (56) A.J.I.L. pp.514-517, where the author outlines the relationship of both schools to each other. See also the critique of this account rendered by Kunz, J.L. in "De Jure Naturae et Gentium", 1962 (56) A.J.I.L. pp.748-751.

Positivist thought denied the existence of the essence of law in a higher reality than was physically ascertainable, instead advocating that the essential criteria and content of law were to be found within the parameters of the natural and material world. Emphasis was placed on the significance of the observation and determination of physical facts, and consequently the metaphysical hypotheses and abstract deductions of the antecedent school were renounced and criticized.

Within the sphere of the law of nations this process was manifested in the frequent assertion that international obligations could only be identified when supported by the actual physical practice of nations.[149] The authority of state practice was perceptibly elevated beyond the comprehension of those previously deliberating upon the subject. State practice became the epitome of the works of subsequent jurists, and in the development of the modern customary law at this era, international law could be characterized as succumbing to this influence in the formation of custom in the positive terms of *opinio juris* and state practice.[150]

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[149] On the methodology of positivism, relative to the deduction of the rules of international law, Oppenheim stated, in "The Science of International Law: Its Task and Method", 1908 (2) A.J.I.L. pp.313-356, at pp.333-336, that:

> "The positive method is that applied by the science of law in general, and it demands that whatever the aims and ends of a worker and researcher may be, he must start from the existing recognized rules of international law as they are to be found in the customary practice of the states or in law-making conventions."

[150] For a commentary of the historical development of

The naturalist school, so influential in the seventeenth and eighteenth centuries, declined rapidly in the late nineteenth century, because of the impossibility of founding an objective legal order upon such a subjective basis as a revealed law of nature.[151] In the eighteenth century, leading positivists such as Bynkershoek and Moser had gained a certain degree of influence, but this had not been at the absolute expense of natural law.[152] However, the demise of natural law was gradual insofar as one technique

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[150] (cont'd) customary law see, D'Amato, A. *The Concept of Custom in International Law* (1971), pp.47-72. The culmination of the positive processes in international law was exemplified by the Permanent Court of International Justice in the *Lotus Case* (1927) P.C.I.J. Reports, Series A, No. 10, p. 3, where the Court stated:

> "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed".

[151] Briggs, H.W. *The Law of Nations* (1944), p.23.

[152] See, Bynkershoek, C. *De Rebus Bellicis*, Bk. I, Chapter X, where this jurist said:

> "The law of nations on this subject is to be drawn from no other source than reason and usage...Usage is shown by the constant, and as it were, perpetual custom, which sovereigns have observed of making treaties and ordinances upon the subject."

The principal works of Moser include: *Grundsatze des Jetzt Ublichen Volkerrechts in Friedenszeiten* (1750); *Grundsatze des Jetzt Ublichen Volkerrechts in Kriegszeiten* (1752); and *Versuch des Neuesten Europaischen Volkerrechts in Friedens - und Kriegszeiten* (1777-1780). According to Moser, usage was to be collated from precedents, or examples, of what was the most frequent or approved practices of states. A rule was, therefore, to be inferred from these examples, and not deduced *a priori* to test the validity of a particular precedent. See Wheaton, H. *A History of the Law of Nations in Europe and America* (1845), pp.325-326.

did not completely supplant the authority of the other by mutual exclusion.[153]

In the development of the principle of non-intervention, Martens was the most prominent jurist displaying these propensities. He published a syllabus of his lectures on the practical or positive European law of nations which was subsequently enlarged into a summary of the modern law of nations, first appearing in 1788, and which passed through numerous editions.[154] However, Martens' disposition as a hybrid positivist was evidenced by his penchant to employ the natural law of nations to interpolate insufficiencies within the positive law of nations. Substantial reference was made to international treaties and customary practices, upon which was built the positive law. The significance of this work was in the historical fact that it represented the movement of international legal thought from the naturalist prescriptions, into the positivist era.

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[153] For example, in United States v The Schooner La Jeune Eugenie, U.S. Circuit Court, First Circuit, 1822 2 Mason's Reports, p.409, the Court stated:

> "[T]he law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states. What, therefore, the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods."

See also Thirty Hogsheads of Sugar v Boyle, U.S. Supreme Court, 1815, 9 Cranch, p.191, at p.198 and The Queen v Keyn [1876] 2 Exchequer Division, p.63, at pp.153-154, where the Court displayed a tendency towards positivist methodology by stating:

> "The law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be a matter of evidence. Treaties and acts of state are but evidence of the agreement of nations, and do not in this country at least *per se* bind the tribunals. Neither, certainly, does a consensus of jurists; but it is evidence of the agreements of nations on international points."

[154] Oppenheim, L. International Law (Eighth edition, Lauterpacht, 1955), Vol. 1, Para. 56, pp.96-97.

Despite these positivist traits, Martens' contribution to the development of the non-interference norm derived substantial support from the earlier naturalist legacies of Wolff and Vattel.[155] Indeed, although he believed that the realities and modalities of international interactions necessitated modification of the law of nations by express and tacit convention and custom, his work owed much to the framework conceived by prior jurists. However, the authoritative basis of the genesis of the principle of non-interference, as perceived in this era, was transformed from that of abstract naturalist reasoning, into state practice, which was a significant metamorphosis in the construction of the principle.

Martens devoted substantial discussion to the nature of a multitude of so-called "inherent rights" of sovereign states, but failed to specify the origin of these rights.[156] However the terminology and phraseology of these passages are remarkable in their resemblance to the exposition by

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[155] See Wheaton, op. cit. pp.325-328.

[156] Martens, G.F. von. The Law of Nations (Fourth edition, Translated by W. Cobbett, 1829), Bk. III, Chapter I, Section 1, p.67.

Vattel. After deliberating upon the nature and content of these rights, he entered upon an elaborate and precise description of the freedom of a state to exist, commenting that:

> "The internal constitution of a state rests, in general, on these two points: viz, on the principle adopted with respect to him or them in whose hands the sovereign power is lodged...and on those adopted with respect to the manner in which this sovereign power is to be exercised. Both these depend on the will of the state, foreign nations having not the least right to interfere in arrangements which are purely domestic."[157]

Martens openly acknowledged that even this principle was not absolute. In certain circumstances, interests and considerations other than respect for sovereignty were paramount. The specific causes for which interference into a sovereign's internal affairs were deemed legitimate were further supported by the pragmatic realities of international relations. The following were advanced as legitimating interference in the sovereign integrity of a states, where a state was internally divided into two or more competing groups:

> "In case a dispute should arise...a foreign power may: 1, offer its good offices, and interpose them, if accepted; 2, if called in to the aid of that of

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[157] Martens, ibid, Bk. III, Chapter II, Section 1, p.69.

> two parties which has justice on its side, it may act coercively; 3, it may have a right, from positive title, to intermeddle; and 4, if its own preservation require it to take part in the quarrel, that consideration overbalances its obligations to either of the parties."[158]

The first ground mentioned, that of mediation, would be difficult to classify as coercive interference, yet it was incorporated into the exceptions to the general rule of respect for sovereignty. His incorporation of a non-coercive act together with acts of coercive interference reflect his failure to identify the essential nature of intervention.

Following the precedent established by Vattel[159], Martens adhered to the opinion that a nation was entitled to assist one or other party in the case of an civil armed conflict, but only to the extent that this party was waging a "just" war. In describing interference by assistance, he included military assistance as well as moral support, and therefore this would not be restricted to the offer of good offices or mediation, but would include physical military action.[160]

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[158] Martens, ibid, Bk. III, Chapter II, Section 1, pp.69-70. See De Lima, F.X. Intervention in International Law (1971), p.10.

[159] See text above, pp.62-63.

[160] Martens, ibid, Bk. III, Chapter II, Section 10, pp.79-80. See Butler, G. & Maccoby, S. The Development of International Law (1928), at p.72, where the authors point out that Martens' text, in this respect, provided the powers of the Holy Alliance with a legal defence for the political interventions upon which they embarked in the numerous constitutional disputes which took place between sovereigns and their peoples in the Europe of the early nineteenth

This passage also revealed Martens' support for military intervention under the provisions of a properly framed obligation stipulated in an appropriate pact. In this respect, Martens appealed to treaties which guaranteed succession, as opposed to treaties of mutual alliance. In elaborating this right Martens continued:

> "(S)hould there arise dispute...in the interior of the Kingdom, no foreign power can, with justice, interfere...However, motives of friendship and good neighbourhood may induce a prince to interpose his good offices. He may also be called in to the aid of one of the parties whom in virtue of treaty he is obliged to assist."[161]

Consequently, interference by request from a monarch whose dynasty was guaranteed by treaty was legitimate, despite the fact that such interference would almost inevitably culminate in civil conflict.

Martens also sanctioned interference in the domestic concerns of a state when the physical integrity and security of another state was threatened. This right could be exercised *ex motu proprio* since the right of self-preservation was described as an all-pervasive right of a nation.[162]

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[160] (cont'd) century. However, the trend with respect to intervention in civil conflicts was decidedly moving towards a rule of absolute non-interference. See Lawrence, T.J. Principles of International Law (Seventh edition, 1923), Para. 68, pp.131-132, which highlights this movement.

[161] Martens, ibid, Bk. III, Chapter II, Section 9, pp.77-78.

[162] Martens, ibid, Bk. III, Chapter II, Section 9, pp.78-79.

Finally, Martens recognized one further ground of interference, but in this case, intervention was not dependant on the existence of a civil conflict. Again from the precedent established by Vattel, a state could interfere to preserve a balance of power. Where a nation was already powerful, and where further aggrandization would result in danger to the safety and liberty of neighbouring states, then the threatened state or states could establish alliances for the purpose of restricting the growth of that state.[163] In effect, this was tantamount to sanctioning the subsequent actions of the so-called great powers of Europe in their creation of the Congress and Concert systems of regulation.

One particularly interesting point is that it appears that Martens failed to classify interference by a third party in a war between two belligerents as intervention, within his sense of the term. This ground, which would later be classified as interference in the external affairs of one or more states, was considered by Martens to be assistance to a belligerent engaged in an international conflict, and a right which could be exercised at the discretion of that party. Such an evaluation stands in contrast to later statements of the obligations incumbent on states in this matter.[164]

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[163] Martens, ibid, Bk. III, Chapter III, Section 6, pp.91-92.

[164] See Baker, S. First Steps in international Law (1899), p.180 and Winfield, P.H. "The Grounds of Intervention in International Law", 1924 (V) B.Y.I.L. pp.149-162, at p.155.

Substantial deviation from the principle of non-interference was, therefore, permitted, based upon the twin authorities of previous jurists and, and on the European state practices of this period. The degree to which Martens submitted to the practices of nations at this time was later evident when the author stated:

> "These exceptions, and particularly the last two, have been so extended by the practice of European nations that no internal dispute of importance, can now arise in any of them, but foreign powers find some pretext to take part in it, if they find it convenient."[165]

This work emphasized the prevailing positivist predominance creeping into international legal literature, and subsequent jurists were to make greater reference to state practice as a precedent or authority for their assertions. Statements of a legal nature became predominantly predicated upon such illustrations of state practice and consequently, such articulations upon the nature and content of the law of nations came to represent the distillation of state practice within in each respective historical period.

First writing in 1836, the North American jurist Wheaton produced an extremely influential commentary on international law, which continued into its eighth edition, edited by Dana, in 1866.[166] This work represented the most influential and authoritative statement of international legal opinion from the North American international jurisprudential perspective[167], and therefore provided an interesting balance and contrast to the prevailing Eurocentricism. Wheaton blended state practice with propositions derived from the naturalist forefathers of international law and concluded that international law was that body of rules "which reason deduces...from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent."[168] Consequently, this work cannot be classified as a product of exclusively positive processes.

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[165] Martens, ibid, Bk. III, Chapter II, Section 1, p.70.

[166] Notwithstanding the copious notes added by Dana as editor of this work in its later editions, the actual text of Wheaton's commentary regarding non-intervention did not

As the fundamental and supporting principle for his elaboration of the rights and duties of states, Wheaton described the sovereign nature of states in the following terms:

> "Every state...may freely exercise all its sovereign rights in a manner not inconsistent with the equal rights of other States. Among these is that of establishing, altering or abolishing its own municipal constitution of government. No foreign state can lawfully interfere with the exercise of

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166(cont'd) alter between the first and eighth editions. However references to both the first and eighth editions will follow in deference to the immense authority of the final edition.

[167] See Reeves, J. "The First American Treatise on International Law", 1937 (31) A.J.I.L. pp.697-702.

[168] Wheaton, H. Elements of International Law (First edition, 1836), Part I, Chapter I, Para. 2, p.46. (Eighth edition, Classics of International Law, edited by Dana, 1866, Part I, Chapter 1, Sec. 14, p.20)

> this right, unless such interference is authorized by some special compact, or by such a clear case of necessity as immediately affects its own independence, freedom and security."[169]

He acknowledged the existence of the principle, originally established by the combined efforts of Wolff and Vattel, that sovereign states were entitled to the peaceable exercise of their sovereign rights insofar as such exercise was not incompatible with the coexisting rights of other nations. However, in attempting to reconcile the right of autonomy established in the naturalist era, with the state practice of his own era, Wheaton was forced to admit that the machinations of international relations dictated that the principle would not be absolute, and that exceptions to the principle existed.

A strict interpretation of the non-interference principle was therefore assumed which took cognizance of two principal justifiable causes for interference in a nation's sovereign domain, both emanating from his perception of the paramount and essential rights of other states. Firstly, he believed that, under the specific provisions of an appropriate treaty, rights of intervention could be properly conferred. Instruments which established such rights of interference included "treaties of alliance, guarantee, and mediation, to which the state itself whose concerns are in question has become a party."[170] In support of his proposition that assistance was legitimate under a treaty guaranteeing succession, Wheaton cited several instances of state practice in the eighteenth century, including the wars of the Spanish, Bavarian and Austrian successions.

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[169] Wheaton, ibid, Part II, Chapter II, Para. 1, p.95. (Eighth edition, Part II, Chapter I, Section 72, p.100)

The second ground for legitimate interference was predicated upon the fundamental right of all sovereign states to self-preservation. Interference was permitted for a sovereign when "growing out of a necessity involving their own particular security, or some contingent danger affecting the general security of nations."[171] This justification, although originally elaborated by Wolff in less specific terms[172] , was becoming a universally accepted ground for interference especially in subsequent works dealing with the subject.[173] Flowing from this right was also the legitimation of the right of self-defence.[174]

The legitimacy of one other ground of interference was also conceded when he proposed:

> "The approved usage of nations authorizes the proposal by one State of its good offices or mediation for the settlement of the intestine dissensions of another State. When such an offer is

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[170] Wheaton, ibid, Part II, Chapter II, Para. 4, p.97. (Eighth edition, Part II, Chapter I, Section 75, p.103)
[171] Wheaton, ibid, Part II, Chapter II, Para. 4, p.97. (Eighth edition, Part II, Chapter I, Section 75, p.103)
[172] See text, above, p.59.
[173] See text, below, pp.173-178.
[174] Wheaton, op cit. Part II, Chapter I, Para. 3, p.81. (Eighth edition, Part II, Chapter I, Section 61, p.75)

> accepted by the contending parties, it becomes a just title for the interference of the mediating power. Such a title may also grow out of positive compact previously existing, such as treaties of mediation and guarantee."[175]

Although interference was prohibited in the internal conflicts of a neighbouring nation, this contingent right could be exercised, but only upon the successful conclusion by the two parties of an agreement to mediate the issue of contention. Further, according to this author, such a power could be delegated to another state in advance of the outbreak of hostilities, by the negotiation of a treaty which conferred such powers of interposition in times of civil strife.

Notwithstanding his support of these respective grounds for abrogation of the general rule of non-interference, Wheaton was generally critical of other allegedly legitimate causes which had been asserted throughout the course of history. On occasions when interference had been premeditated by assertions of re-establishing an imbalance of power, such as Vattel had alleged, this action was denounced as "the pretext of the most bloody and destructive wars waged in modern times...[of which] the greater part have been founded upon insufficient reasons, disguising the real motives by which princes and cabinets have been influenced."[176] Wheaton also subsequently ridiculed such actions as furnishing "a strong admonition against attempting to reduce to a rule, and to incorporate into the code of nations, a principle so indefinite, and so peculiarly liable to abuse, in its practical application."[177]

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[175] Wheaton, ibid, Part II, Chapter II, Para. 1, p.95. (Eighth edition, Part II, Chapter I, Section 73, pp.100-101)

However, in general, the determination of the legitimacy or otherwise of a putative legal principle should be made in the light of its legal pedigree, and not solely in terms of the vagaries of the assertions, since all rules are to some extent uncertain. Consequently, it may have been premature to withhold legal qualifications to this rule, particularly in the light of the prevailing contemporary state practice. Subsequent legal opinion supported to a certain degree such a rule which casts a degree of uncertainty regarding the accuracy of this proposition.

Again ignoring the precedents established by his forebears, Wheaton refused to permit interference in the case of internal division within a nation, other that through the medium of treaty rights.[178] Despite his support for mediation through treaty in the event of internal dissension, by merely asserting a limited number of grounds for legitimate interference, he impliedly denied this right.[179] In respect of the concept of humanitarian intervention, Wheaton did have a certain degree of sympathy with earlier writers asserting such a right. He believed that the actions of the Christian powers, in favour of the Greek rebels, in 1827, was an exercise of a collective right of humanitarian intervention.[180] However, although this is the case, little consideration is given to the topic as a theoretical problem, and, therefore, his opinion in the matter remains somewhat confused.

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[176] Wheaton, op. cit. Part II, Chapter I, Para. 3, p.83. (Eighth edition, Part II, Chapter I, Section 63, p.77)
[177] Wheaton, op. cit. Part II, Chapter I, Para. 5, p.85. (Eighth edition, Part II, Chapter I, Section 64, p.78)
[178] See text above, pp.62-63,72.

The comments made by Wheaton at this time can be seen as an authoritative construction of North American legal opinion in the earlier half of the nineteenth century. Although his views were influenced by the positivist movement in international legal literature, at the same time he was not ignorant of his naturalist heritage, and frequently cited naturalist writers as authority for his propositions. Nevertheless, state practices were undoubtedly afforded greater significance than in previous monographs. His attempt to limit in general the permissible interference of states in sovereign affairs, can be portrayed as an attempt to resolve the complex dichotomy which confronted him regarding the right of a sovereign state to autonomy and freedom, in the light of substantial adverse state practice.[181]

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[179] Wheaton merely stated that:

> "the approved usage of nations authorizes the
> proposal by one State of its good offices or
> mediation for the settlement of the intestine
> dissensions of another State".

Wheaton, op. cit. Part II, Chapter II, Para. 2, p.95.
(Eighth edition, Part II, Chapter I, Section 73, p.100)

[180] Wheaton, op. cit. Part II, Chapter I, Para. 10, pp.91-92
(Eighth edition, Part II)

Originally writing in 1854, the British jurist Phillimore may be considered a contemporary of the former writer. However, his perspective upon the description of international law was radically positive, his work typifying British arch-positivism in this period. Phillimore's description of the principle of non-intervention was equally profound as the treatment given by his contemporaries, as well as in the detailed articulation of the principle. He concurred with Wheaton in the statement of the positive obligation of sovereigns to refrain from interfering in the affairs of sovereign nations. Since sovereign entities were entitled to equality and independence in international law, then:

> "A State in the lawful possession of a territory has an exclusive right of property therein, and no stranger can be entitled, without her permission, to enter within her boundaries, much less to interfere with her full exercise of all the rights incident to that supreme dominion..."[182]

However after stating this rule in these terms, a considerable number of exceptions to the general rule were advanced, which virtually negated the principle, and which substantiated his positivist pedigree. He deduced that "(t)he reason of the thing [principle of non-interference] and the practice of nations appear to have sanctioned [the following grounds of] intervention"[183] Each of the various permitted exceptions to the rule were derived from European state practice and included: intervention for the self-preservation of a state, where the domestic institutions of a neighbouring nation were inconsistent with the safety of the former[184]; intervention to maintain or uphold the balance of power[185] ; intervention under the appropriate provisions of a treaty of guarantee[186] ; intervention to protect reversionary rights or interests[187] ;and intervention at the invitation of the parties engaged in a civil conflict.[188]

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[181] Vincent, R.J. Intervention and Non-Intervention (1974), pp.33-34.

[182] Phillimore, R. Commentaries Upon International Law (First edition, 1854), Vol. 1, Part III, Chapter IV, Para. 165, p.151. (Third edition, 1879, Vol. 1, Part III, Chapter IV, Para. 151, p.221)

Focusing upon the distinct rationales for such an alleged right, consider his assertion of the right to interfere in a domestic conflict. He did not assert an unrestricted right to interfere, but subjected such an action to certain preconditions. Thus he initially submitted:

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[183] Phillimore, ibid, Vol. 1, Part IV, Chapter I, Para. 434, p.315. (Third edition, Vol. 1, Part IV, Chapter 1, Para. 393, p.559)

[184] Phillimore, ibid, Vol. 1, Part IV, Chapter 1, Para. 435, p.315. (Third edition, Vol. 1, Part IV, Chapter 1, Para. 394, p.560)

[185] Phillimore, ibid, Vol. 1, Part IV, Chapter 1, Para. 447, p.323. (Third edition, Vol. 1, Part IV, Chapter 1, Para. 402, p.574)

[186] Phillimore, ibid, Vol. 1, Part IV, Chapter 1, Para. 441, p.319. (Third edition, Vol. 1, Part IV, Chapter 1, Para. 399, p.568)

[187] Phillimore, ibid, Vol. 1, Part IV, Chapter 1, Para. 465, p.335. (Third edition, Vol. 1, Part IV, Chapter 1, Para. 408, p.615)

[188] Phillimore, ibid, Vol. 1, Part IV, Chapter 1, Para. 472, p.338. (Third edition, Vol. 1, Part IV, Chapter 1, Para. 409, p.618)

> "Although the right of intervening admits of no doubt where both parties invoke the Intervention, it is less clear when the application is made by one party alone. It can however hardly be asserted that even this kind of Intervention, so solicited, is at variance with an abstract principle of International Law, while it must be admitted to have received continual sanction from the practice of nations."[189]

Notwithstanding the assertion that assistance could be rendered to either side in the conflict, certain limitations on the absolute and unfettered right to interfere were proposed. In order to sanction intervention, a *bona fide* conflict must exist between the antagonists, and no mere temporary outbreak of rebellion, nor isolated opposition to the authorities satisfied this condition. Indeed, he alleged that there should be "such a contest as exhibits some equality of force, and of which, if the combatants were left to themselves, the issue would be in some degree doubtful..."[190]

Despite the proclamation of such preconditions, this passage typified Phillimore's predisposition to rubber-stamp state practices as the hallmark of international law. Indeed, in the foregoing situation, the tide of legal scholarship opposed such an exposition of the state of the law regarding interference in civil conflicts.[191] While this jurist professed such assistance could be given to either party, the converse of this proposition was to prevail, and the tendency of doctrine would generally be to favour a prohibition of intervention in favour of either party engaged in a civil conflict, although their was a certain degree of undercurrent in favour of support for a friendly government.

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[189] Phillimore, ibid, Vol. 1, Part IV, Chapter 1, Para. 443, p.320. (Third edition, Vol. 1, Part IV, Chapter 1, Para. 401, p.569) This statement was directly criticized by Hall in A Treatise on International Law (Eighth edition, 1924), Part II, Chapter VIII, Para. 94, p.346.

[190] Phillimore, ibid, Vol. 1, Part IV, Chapter 1, Para. 443, p.320. (Third edition, Vol. 1, Part IV, Chapter 1, Para. 401, p.570)

Since Phillimore perceived the empirical test of international law in terms of state practice, he was predictably cautious of the legitimacy of "humanitarian intervention" since negligible support for the principle existed in international political history. Phillimore reasoned that:

> "...(i)ntervention by Foreign Powers to stay the effusion of blood caused by a protracted and desolating civil war...can scarcely be admitted into the code of International Law, since it is manifestly open to abuses, tending to the violation and destruction of the vital principles of that system of jurisprudence."[192]

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[191] Farer, T. "Foreign Intervention in Civil Armed Conflict", 1974 (142) Hague Recueil pp.297-406, at pp.318-320.

[192] Phillimore, ibid, Vol. 1, Part IV, Chapter 1, Para. 443, p.320 (Third edition, Vol. 1, Part IV, Chapter 1, Para. 401, p.571). This passage was quoted from Sir J. Mackintosh's

However, it was unclear why interference under this pretext should be more susceptible to abuse than under the guise of invitation from either party in a civil war, since both provide a similar excuse for interference.

Further confusion was provided by the fact that Phillimore appeared to sanction such interventions as an accessory to other grounds.[193] His caution towards such interferences was underlined in his denial of the right of intervention to prevent religious persecutions. In this case he continued:

> "It may, perhaps, be justly contended that the principle [of humanitarian intervention] might be pushed further; and that in the event of persecution of large bodies of men, on account of their religious belief, an armed Intervention on their behalf might be warrantable by International Law, as an armed intervention to prevent the shedding of blood and protracted internal hostilities. It is, however, manifestly unsafe to contemplate these extreme cases of exception from the sound rule of non-interference. The duty of such non-interference is clear; it should not be turned into a doubt."[194]

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[192](cont'd) Speech on the Recognition of the Spanish American States, in his own Works, Vol. III, at p.462.

[193] Phillimore, ibid, Vol. 1, Part VI, Chapter 1, Para. 442, pp.319-320. (Third edition, Vol. 1, Part VI, Chapter 1, Para. 400, p.568-569)

[194] Phillimore, ibid, Vol. 1, Part VI, Chapter 1, Para. 442, p.320. (Third edition, Vol. 1, Part VI, Chapter 1, Para. 400, p.569)

Phillimore epitomized the positive extreme in international jurisprudence. Despite the general lip-service to the prohibition of interference, the multiplicity and vagueness of the exceptions to the general rule posited incontrovertibly detract from his authority in this matter. He contorted the norm of non-interference to the whims of state practice, and, although the majority of his statements were substantiated to some degree by state practice of one kind or another, he was unable to objectively prohibit certain grounds of interference which were inherently repugnant to the rule of non-interference. Notwithstanding the subsequent reproduction of his work into two further editions, this description of the principle of non-interference was most anomalous in comparison to the works of his contemporaries, and the majority of his successors.

One other particularly comprehensive study emerged from this period and is deserving of credit. Although again of North American origin, the international jurist Halleck produced, in 1861, an especially meritorious work particularly relating to the elaboration of the principle of non-interference in international relations. However he differed from Wheaton and particularly Phillimore in his strong emphasis of the influence of natural law. Although not a naturalist in the classical sense of the term, Halleck was decisively influenced by writers for the pre-positivist era.[195] He acknowledged the sovereign rights of a nation, and the derivative right to autonomous self-determination, from which it was inferred that no foreign nation had the authority, in the absence of a legal pretext, to interfere in the free adoption of political and civil institutions within a nation.[196] Reasoning from the confirmation of sovereign rights upon all states, the principle of non-interference was construed as an essential element in international coexistence, and he concluded that "no writer of authority, on international law advocates any general right of one state to interfere with the domestic concerns and internal government of another sovereign and independent state."[197]

This terse construction of the obligation of non-interference, permitted only two cognate grounds upon which interference was justified. When the fundamental independence, freedom and security of a nation was threatened by another state, then intervention was permissible to circumvent adverse conduct, since:

> "[Self-preservation] is one of the most essential

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[195] The nature of this dual influence can be gleaned by his definition of international law which he perceived as :

> "The rules which ought to regulate the conduct of nations in their mutual intercourse [and which] are undoubtedly deduced, in part, from reason and justice, and from the nature of society existing between independent states or bodies politic; and, in part, from usage, and the agreements or compacts entered into between different nations."

Halleck, H.W. International Law (First edition, 1861), Chapter II, Para. 2, p.43. (Emphasis added)

[196] Halleck, ibid, Chapter IV, Para. 2, p.82.

[197] Halleck, ibid, Chapter IV, Para. 4, p.83.

> and important rights incident to state sovereignty, and lies at the foundation of all the rest. It is not only a right with respect to other states, but a duty with respect to its own members and one of the most important duties which it owes to them."[198]

This assertion was particularly popular in the various works of this period, and continually recurred in a number of subsequent writings.[199]

The sole other ground for legitimate interference was when armed action was manifested in self-defence, but under this pretext a number of criteria had to be satisfied. In this case Halleck stipulated:

> "That a right of pacific interference, and even armed intervention, may sometimes grow out of such threatened danger to a particular state cannot be doubted...But such danger must be threatening and immediate, and not a mere remote contingency; and even then the interference must be limited to the removal of the danger itself; beyond that it would be unlawful."[200]

However, he was prepared to acknowledge that allegations of intervention for self-defence, and anticipatory self-defence were frequently resorted to as an excuse for interference, and that "instead of preserving peace, such unlawful interference has frequently been the cause of wars the most cruel and bloody that have ever stained the annals of history."[201]

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[198] Halleck, ibid, Chapter IV, Para. 18, pp.91-92.

[199] Schwarzenberger, G.S. "The Fundamental Principles of International Law", 1955 (87) Hague Recueil pp.195-387, at pp.343-346.

[200] Halleck, ibid, Chapter IV, Para. 5-6, pp.83-84.

Persistent adverse criticism of extra-legal or dubious pretexts for interference was also advanced throughout this consideration of the topic Regarding covenants which guaranteed the succession of a particular form of government, he believed that international morality vitiated any such putative documents, and therefore such agreements had no binding force. Consequently more merit lay in its breach than in its fulfilment.[202] This deduction contrasts with the statements made by Phillimore who favoured such interventions.[203]

In his treatment of humanitarian intervention Halleck appeared uncertain in his convictions. Whilst concurring with Phillimore that the doctrine could "scarcely be admitted into the code of international law, since it is manifestly open to abuses"[204] , he later stipulated that, where a genuine belief existed in such a cause, then intervention could be justified. However, as authority for this proposition, it was unclear whether this justification lay in law, or in an extra-legal source such as morality.

Relating to intervention in a civil war, Halleck was most precise and affirmative in his beliefs. Further, his opinions on this issue were representative of the prevailing doctrines at his time.[205] Halleck provided:

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[201] Halleck, ibid, Chapter IV, Para. 6, p.84.
[202] Halleck, ibid, Chapter IV, Para. 8, p.86.
[203] See text above, p.84.
[204] Halleck, ibid, Chapter XIV, Para. 21, p.340, paraphrasing Phillimore op. cit. note 193.

> "In case of a mere insurrection, which has not acquired the character of a revolution, the insurgents are not considered capable of negotiating with a foreign state, or of becoming a party to any agreement with respect to arbitration or foreign intervention. We have already stated that the invitation of one party to a civil war can afford no right of foreign interference, as against the other party. The same reasoning holds good with respect to armed intervention, whether between belligerent states, or between belligerent parties in the same state."[206]

In his discourse of this aspect of intervention, the principle of absolute non-intervention was reiterated when a nation was engaged in a domestic struggle. His treatment of this issue as an aspect of the law of war achieved a certain significance in the writings of subsequent jurists.[207]

Having construed the principle of non-interference at this comparatively rigorous level, Halleck ultimately summarized his perception of the principle by stating:

> "No government has a right to interfere in the

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[205] Oppenheim, L. International Law (Eighth edition, by Lauterpacht, 1955), Vol. II, pp.248-253.

[206] Halleck, ibid, Chapter XIV, Para. 20, p.339. Earlier, at Chapter III, Para. 20, pp.73-74, this author had stated: "If a foreign state may take part in the civil wars of its neighbors, there would be no limit to its right to interfere in their domestic affairs".

[207] See text below, pp.204-215.

> affairs of another government, except in the case where the security and immediate interests of the first government are compromised."[208]

This strict delimitation of the legal right to intervene was the natural consequence of his description of near absolute sovereignty. Although in contrast to his contemporaries he elaborated a rigorous standard of noninterference, this statement of the principle accorded favourably with the prevalent political philosophy and foreign policies of this time.[209]

The international legal concept of non-intervention originated in the naturalist deductions and hypotheses of sovereignty, but these early international jurists were incapable of prescribing the rule which was ultimately to emerge. In the transformation from naturalist to positivist constructs and processes, the principle acquired concrete form and stability. However the parameters of the obligation to refrain from interference remained controversially uncertain, and the opinions of jurists from the early nineteenth century appear to have failed to alleviate this problem.

The striking fact emerging from an analysis of these jurists has been the lack of cohesion and coherence in this respect. Although a certain consistency was maintained regarding the contents of the core of the concept, which successfully transcended the naturalist-positivist dichotomy, a resolution of the outstanding issues did not satisfactorarily emerge in subsequent writings, and plausibly this has been a major contributing factor in the uncertainties of the principle in twentieth century international law.

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[208] Halleck, ibid, Chapter XIV, Para. 22, p.340.
[209] For example, see Mill, J.S. Dissertations and Discussions (1859), Vol. III, pp.153-178. See also Vincent, op. cit. pp.54-56.

However one differentiation must be made clear at this point. In the historical evolution of the principle of non-intervention, the development of the term "non-intervention" was distinct from the ultimate expression of that set of ideas which have come to represent this concept.[210] The term "intervention", as a vocabulary expression, was initially evidenced in the works of Martens, as well as Wheaton and Phillimore.[211] The terms "non-intervention", "non-interference", "non-interposition" and "non-intermeddling" were also synonymous with each other and employed interchangeably, to connotate the sovereign right of a nation to remain free from unjustified coercion. The concept of intervention, as a hostile act, distinct from an act of war, did not correspondingly evolve. Intervention as a more limited form of sovereign violation, and usually referring to the employment of force by a powerful state against a substantially less powerful nation, did not appear until around the mid-nineteenth century. Consequently, the popular use of the term preceded the development of those obligations which constitute the contemporary perception of intervention, non-intervention being the positive statement of this concept.

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[210] Winfield, P.H. "The History of Intervention in International Law", 1922-23 (III) B.Y.I.L. pp.131-139.
[211] See also Kent, J. Commentaries on International Law (Second edition, Abdy, 1877), pp.41-82 and Woolsey, T.D. Introduction to the Study of International Law (First edition, 1860), Paras 42-51.

On particular limitation was the tendency of these writers to restrict their perception of interference to the internal sovereign affairs of a state. This was despite the fact that, certainly by the time of Wheaton, sovereignty was generally perceived into two facets - external and internal.[212] The tendency of these writers was to associate interference with action for or against a government caught up in internal dissension, and to ignore the possibility of interference in the relationships between states at the international level.

By the end of the first half of the nineteenth century, non-intervention had achieved the status in international law of a fundamental duty imposed upon all sovereign nations. Interventions were prohibited as coercive acts, unless justified by law. Consequently non-intervention was established as a general principle of law, and what remained was to determine which acts of intervention were legitimate and which were not.

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[212] See Winfield, P.H. "The History of Intervention in International Law" 1922-23 (III) B.Y.I.L. pp.130-149, at pp.146-147.

VI. NON-INTERVENTION IN THE FOREIGN POLICIES AND PRACTICES OF STATES IN THE 18TH AND 19TH CENTURIES.

The existence of a necessary connection between those acts of nations conveniently grouped under the nomenclature of "state practice", and the substantive content of international law, is axiomatic. In the absence of such a mutual association, international law would not only lack efficacy, but would be relegated to the dimensions of an irrelevant and impractical academic pursuit. However the exact nature of this bilateral interaction is difficult to identify and formulate in specific terms.[213] Although precise analysis has proved elusive, in pragmatic international relations, the fact that these elements are mutually conditioned by their interaction is undeniable.[214]

The reciprocal influences of state practice and international law upon each other are certainly not identical. International law attempts to induce or motivate nations to conform to certain patterns of behaviour by predicating its rules and regulations upon certain motives.[215] Rules which prescribe and stipulate these international obligations are described by the generic term "international law".[216] Further, it is generally acknowledged that when state practice conforms to these rules and principles, and states abide by international law, then international society will be most stable.

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[213] The effect of state practice in the creation of general customary norms in international law is considered in the North Sea Continental Shelf Cases, I.C.J. Reports 1969, p.3 at pp.41-45.

[214] See generally, Henkin, L. How Nations Behave (1979), pp.13-27; Bull, H. The Anarchical Society (1977), pp.127-161, at pp.136-140; and Morgenthau, H. Politics Among Nations (Fifth edition, 1973), pp.290-91.

[215] Motives which have been suggested to induce conformity to the rules of international law have included self-interest, comity, co-operation, the threat of coercion, and the "law habit". See Akehurst, M. A Modern Introduction to International Law (Fifth edition, 1984), pp.1-11.

However, the same state practices which this law often attempts to regulate also constitute an essential element in the actual composition of this legal order, since international law is basically derived from the wills of the states themselves.[217] International law could generally be described as the sum total of all those settled customs, established practices, official ordinances and legislative enactments that have devolved for the pacific settlement of international proprietary and political disputes. Consequently, this legal structure is an attempt to establish order within the international political society.[218] From the perspective of the international legal analyist, international law is composed of treaties concluded among the various disparate members of the international community, and the customary practices of these nations which evidence "a general practice accepted as law"[219], although certain subsidiary sources have been adduced to fill lacunae.[220] The content of this legal order is, therefore, in essence, a distillation of the various practices of nations in the conduct of their international affairs.[221]

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[216] The term "international law" was originally formulated by the English philosopher Bentham, in his work Principles of Morals and Legislation (1780), Chapter 17, Section II, at note 1, where the author stated:

> "The word international, it must be acknowledged, is a new one, though it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which commonly goes under the name of the law of nations."

See, Junis, M.W. "Jeremy Bentham and the Fashioning of "International Law"", 1984 (78) A.J.I.L. pp.405-418. See also Walker, T.A. A History of the Law of Nations (1899), Vol. 1, p.1-19.

[217] The S. S. Lotus Case, (1927) P.C.I.J. Reports, Series A, No. 10, p.3 at p.18. See also Green, L.C. "Is International Law Law", in Law and Society (1975), pp.133-182.

[218] See Carr, E.H. The Twenty Years' Crisis (1939), pp.219-231.

Since the essential nexus of this mutual relationship cannot be denied, and since the international practices of nations, as represented through the instrumentatlity of their foreign policies, constitute the quintessence of this international legal code, then an examination of the origins of the various rules evolved in international political history becomes imperative. Such an analysis should not only reveal the normative effect of the principles in international law, but will also determine the motives and justifications for both compliance and deviance from the general rule.

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[219] Article 38(1), Statute of the International Court of Justice.

[220] These sources include general principles of law, judicial decisions and the opinions of prominent international publicists.

[221] See D'Amato, A. The Concept of Custom in International Law (1971), pp.21-44, which describes the relationship of customary international law to state practices. See also Akehurst, M. "Custom as a Source of International Law", 1974-75 (XLVII) B.Y.I.L. pp.1-53. and Villiger, M.E. Customary International Law and Treaties (1985), pp.3-62.

The identification of the embryonic principle of non-interference in the domestic affairs of independent nations, from which the obligation to refrain from intervention in twentieth century international law emerged, was not solely manifested in the imaginations of the various international jurists who participated in its gradual evolution. A survey of state policies during these periods does reveal the evolution of a similar principle as that described by jurists. However, not until around the mid-nineteenth century did this principle coalesce into a widespread practice. Even then, substantial exceptions existed to the general rule of non-interference. But, the essential factor to be observed is that, as jurists were formulating a concept of non-interference, a similar principle of foreign policy was being espoused by certain nations of Europe, although this was admittedly of an ill-defined and primitive nature.

The evolution of policies of abstention from the unjustified use of force against the sovereign domestic concerns of other nations must be evaluated against the general background of the political and military events of this era, and the circumstances which had recently fundamentally altered the pre-existing political geography of Europe, as well as the balance of power. Political developments, expediency and national affiliations unquestionably influenced jurists in their descriptions of international law at this political period, notwithstanding the potent influences of certain political patronages.[222] National or political associations were able to influence the opinions of certain jurists, resulting in unreliable descriptions of the law at this time.[223] However, where a broad consensus of opinion and doctrine was present, then the content of the law can be ascertained to a sufficient degree.

To allege that the principle of non-interference, and ultimately of non-intervention, were creations of juristic imagination would effectively ignore the interaction between law and the political relations of the various nations which dictated the evolution of the history of this time, and which foreshadowed the legal illumination of the principle of non-intervention. The enumeration of sets of circumstances which escaped the prohibition of non-interference, and which were permitted to deviate from the general principle, were not haphazard products of a factual vacuum, but rather the result of state practices which were recognized as the norm.

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[222] The status and relationship of commentators and jurists in the eighteenth century regarding the sovereign authorities of continental Europe, varied considerably from the situation in modern times. Not only was political patronage expected, but also fidelity and allegiance to the monarchical overlord. See Nussbaum, A. A Concise History of the Law of Nations (1950), pp.142-177.

[223] For example, A.G. Stapleton's work Intervention and Non-Intervention (1866) was little more than a veiled attack on the policy of the British Foreign Secretary, Palmerston, and his policy of intervention in support of liberalism in continental Europe. Similarly, Count Mamiani's work The Rights of Nations (Translated by R. Acton, 1860) was strongly influenced by his political motivations to establish a constitutional government in Italy.

Therefore, the principle of non-intervention can be fairly said to be the synthesis of certain statements and practices by nations which legal writers have construed as illustrative of the framework of the international obligations imposed upon each member of the family of nations. In this sense even the most adamant proponents of positivist doctrines in the nineteenth century were victims of the inherent and persuasive desires of man for fairness, justice, peace and order which are essential to humanity.

A. LATE EIGHTEENTH CENTURY STATE PRACTICE.

After the reception of sovereignty as a result of the Peace of Westphalia in 1648, a universal respect for the sovereign integrity of states emerged in the later half of the seventeenth century, and throughout the eighteenth century. A complementary recognition of the general prohibition against the unjust use of force against the sovereignty of a nation also flowed from the essential nature of the concept. Therefore, in eighteenth century political history, the arbitrary employment of force by one nation against another, in the absence of justifying circumstances, was universally acknowledged as delictual conduct.

The particular legal fiction by which sovereignty was protected in eighteenth century Europe was characterized by the *bellum justum* theory. The existence of this concept substantiates the proposition that, in the absence of a *causus belli*, restraint from the adoption of unregulated and arbitrary force was the rule rather than the exception in eighteenth century European politics. This theory was the product of naturalist discourse upon the legal nature of war, and was thoroughly discussed by Grotius, Suarez, Belli, Gentili, Pufendorf, Wolff and Vattel.[224]

Within this construction of international relations, only the polar extremes of war and peace were acknowledged.[225] The sole possible interpretation of restricted use of force, such as typifies intervention in the twentieth century sense of the term, was as an act of war which would necessarily confer upon the aggrieved nation the right to retaliate.[226]

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[224] See Grotius, H. De Jure Belli Ac Pacis Libri Tres (1625), Classics of International Law (Translated by F.W. Kelsey, 1923), Bk. I, Chapter II, Secs. I-XVI, pp.51-90, and Bk. II, Chapter XXII, Secs. I-XVII, pp.546-556; Belli, P. De Re Militari et Bello Tractatus (1563), Classics of International Law (Translated by H.C. Nutting, 1936), Bk. II, Chapter 1, pp.59-62; Gentili, A. De Iure Belli Libri Tres (1612), Classics of International Law (Translated by J.C. Rolfe, 1933), Bk. I, Chapter V, pp.27-30, and Chapters VI and VII, pp.31-35; Wolff, C. Jus Gentium Methodo Scientifica Pertractatum (1734), Classics of International Law (Translation by J.H. Drake, 1934), Chapter VII, Section 781, pp.403-404; Vattel, E. de The Law of Nations (1758), Classics of International Law (Translated by G.D. Gregory, 1916), Bk. III, Chapter III, Para. 26, p.243; and Suarez, F. Selections from Three Works (1612), Classics of International Law (Edited by J. B. Scott. 1944), Chapter XIII, Section IV, pp.815-822, which stated at p.816:

> "Therefore, I hold, first: that there can be no just war without an underlying cause of a legitimate and necessary nature...Now, that just and sufficient reason for war is the infliction of a grave injustice which cannot be avenged or repaired in any other way."

See also Ballis, W. The Legal Position of War: Changes in its Practice and Theory from Plato to Vattel (1937), especially pp.77-134.

[225] See Grotius, ibid, who stated in Bk. III, Chapter VII, Para 1, "*Inter bellum et pacem nihil est medium.*"

Although it is difficult to establish a particular period in which to begin to analyse the semblance of a general policy of non-interference in European affairs, the period which marked the end of the Seven Years' War represented the demarcation of a new era in European politics, and one from which ultimately states would abide by the general principle of non-interference without justification in the conduct of their foreign policies.

The Seven Years' War was fought by Great Britain and Prussia against the combined forces of Austria, France, Poland, Russia, Saxony and Sweden, between 1756 and 1763.[227] The ultimate settlement of this confrontation resulted in the first major political settlement since the Peace of Westphalia.[228] In conjunction with the victory of the Prussian and British coalition came a political settlement which stabilized the geopolitical frontiers in Europe, and also established the supremacy and domination of Great Britain, not only as a naval power, but also as the supreme colonial overlord. From this position of psychological superiority emerged a British foreign policy based on the twin pillars of respect for sovereignty, and the collateral obligation of non-interference which this necessarily entailed, and the maintenance of the equilibrium established by this balance of power.

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[226] For a discussion of the evolution of the bellum justum theory, see Elbe, J. von. "The Evolution of the Concept of the Just War in International Law", 1939 (33) A.J.I.L. pp.665-688. A discussion of the limitations of the just war theory was undertaken in Kunz, J.L. "*Bellum Justum* and *Bellum Legale*", 1951 (45) A.J.I.L. pp.528-534. In particular, Kunz discussed the inherent difficulties in differentiating objectively the party with the just cause, at pp.531-532. Degrees of military intervention were not differentiated from absolute aggression, and could only be comprehended in terms of grievous violations of sovereignty, which implied the appropriate response.

[227] A summary of the rivalries, and the political events of this era is provided in Guedalla, P. The Partition of Europe, 1715-1815 (1914), pp.45-67.

[228] Consolidated Treaty Series, 1760-1764, Vol. 42, pp.347-386 and pp.279-345, and Martens, G.F. Recueil des Principaux Traites, 1761-1778, Vol. 1, pp.33-61, and pp.61-68. Both these documents, the Peace of Hubertsburg of February 15, 1763, and the Peace of Paris of Feburary 10, 1763, are translated in Israel, F.L. Major Peace Treaties of Modern History (1967), pp.305-328 and pp.329-350.

From the late 1760s until around the early 1790s, as a powerful naval and military nation, Great Britain exerted considerable political and economic influence which could be brought to bear against any potential threat to this balance of power, which strongly favoured the continued development of British influence. British foreign policy was conducted upon the implicit premise of the maintenance of the *status quo*. Order and stability were perceived as best served through adherence to a general policy of respect for European national sovereignty, and the duty of refraining from interfering in the internal affairs of foreign nations, coupled with tolerance of the existing structure of the international society.[229]

But in France, growing dissatisfaction with the incumbent monarch had gathered impetus and, after several years of fomenting discontent, the French monarchy was overthrown, and a republican form of government established. The French revolutionary movement, which surfaced in 1789, attempted to substitute political democracy in place of the incumbent monarchical administration of Louis XVI. Patriotism was therefore no longer synonymous with mere allegiance and fidelity to a monarch, but became a unifying force for both liberty and nationalism. "Popular sovereignty" was the expression which typified the beliefs of those who participated in the struggle against the French monarch's continued incumbency.

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[229] See Lingelbach, W.E. "The Doctrine and Practice of Intervention in Europe", 1900, Vol. 16, Annals of the American Academy, pp.1-32, at pp.13-14.

After the revolution, and the establishment of the revolutionary government in France, a number of republican philosophers suggested the form of foreign policy for such an administration. Kant, although not of French origin, was a staunch supporter of republicanism. In declaring his principles for perpetual peace, he stipulated one of these conditions to be the principle that:

> "No nation shall forcibly interfere with the constitution and government of another."[230]

This rule was not, however, construed as a precept of international law, but rather, as a strictly political device. In the first article of his proposals, he declared that the civil institutions of all states should be republican, and, therefore, the obligation of non-interference was applicable only between republican governments *inter se*. This obligation was not perceived to extend to the relations between republican states and monarchical nations, and, further, it was recognized that this rule was not absolute.[231]

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[230] Kant, E. Essays on Perpetual Peace (Edited by T. Humphrey, 1983), p.109. (Emphasis added)

As an exception to the general rule, Kant observed:

> "...if, as a result of internal discord, a nation were divided in two and each part, regarding itself as a separate nation, lay claim to the whole; for (since they are in a condition of anarchy) the aid of a foreign nation to one of the parties could not be regarded as interference by the other in its constitution."[232]

In this scenario, the conditions of peace would allegedly be fulfilled if all nations would abstain from interference in the internal composition of all other nations.[233] The sole exception to this rule related to the existence of an internal conflict, in which two separate *de facto* states had been established. When this internal dissension had not succeeded in attaining this level of anarchy, then interference from external powers was an infraction of an independent people's right to struggle with their own weaknesses. This description obviously favoured the struggling republican revolutionaries in European nations who were faced with the overwhelming domination of the fraternity of monarchical nations.[234]

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[231] Thomas, A.V.W. & Thomas, A.J. Non-Intervention (1956), p.7.

[232] Kant, op. cit. p.109.

[233] See Hinsley, op. cit. pp.62-80.

[234] Thomas & Thomas, op. cit. pp.7-8.

After the successful usurpation of the French monarchy by the popular revolutionary forces, and the establishment by the French people of a quasi-democratic order, the French National Assembly, the governing organism of revolutionary France in this era, declared on May 22, 1790:

> "(T)he French nation will refuse to undertake any war of conquest, and will never employ its forces against the liberty of any people."[235]

By this resolution, the governing authorities of France formally renounced any alleged right of conquest, and declared that it was mankind's will, freely expressed, to have his destiny determined solely by his affiliation to the soil.[236]

The constructive right of interference in the internal affairs of a nation, where such concerns threatened the tranquillity of the intervening nation, as previously alleged by Austria, Russia and Prussia in their incursion against the territorial integrity of Poland in 1772, was to serve as the principal pretext for foreign interference in French domestic matters.[237] The internal events in France were construed by certain monarchs as the fomenting of transnational revolution which threatened to permeate throughout all other countries of Europe.[238] The legal pretext for the proposed interference was, therefore, based upon the alleged exercise of the inherent right of a monarch to protect his power structure, although the element of anticipation, and the vagaries of these assertions, call into question the sincerity of such a claim.

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[235] This declaration was incorporated into the French Constitution of 1791, Title VI, the text of which is reproduced in Anderson, F.M. The Constitutions and Other Selected Documents Illustrative of the History of France, 1789-1907 (Second edition, 1908), at p.93.
[236] Lefebvre, op. cit. Vol. 1, pp.145-152.
[237] Taylor, H. A Treatise on International Public Law (1901), Part IV, Para. 81, pp.110-111 and Brownlie, I. International and the Use of Force by States (1963), p.17. Fenwick, C.G. International Law (Third edition, 1948), at p.241, asserts in the outbreak of this revolution the conflict between the principles of self-defence and independence first arose. Austria and Prussia saw in the revolution a threat to the peace of all Europe. As these

The right of sovereigns to interfere in mutual support of other sovereigns was nakedly manifested in the words of the Convention of Pilnitz of August 21, 1791, by which Leopold of Austria and Frederick William of Prussia had declared that they:

> "...look upon the actual situation of his majesty the King of France as an object of common concern to all the sovereigns of Europe [and]...(t)hey hope that this concern will, doubtless, be acknowledged by all the powers...and that, in consequence, they will not refuse employing, in conjunction with the said majesties, the most efficacious means relative to their forces, in order to enable the King of France to consolidate, in the most perfect liberty, the basis of a monarchical government, suitable both to the rights of sovereigns and the welfare of the

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[237] (cont'd) states construed their rights, it was permissible to intervene to prevent the spread of doctrines which would incite Europe into revolt, and eventually culminate in anarchy.

[238] See the Manifesto of the Duke of Brunswick, in Annual Register, 1792, Vol. 34, pp.280-281.

French nation."[239]

The ultimate consequence of this proclamation was the conditional declaration of war by France against Austria on April 20, 1792, and by Prussia against France in July 24, 1792.[240] The French rejection of these ultimata which demanded, amongst other things, the re-establishment of the powers of the monarchy, was delivered by the French government in the "Exposition des Motifs", which was a reformulation of the principle of non-interference.[241]

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[239] Annual Register, 1791, Vol. 33, p.190, and in the Consolidated Treaty Series, 1790-1793, Vol. 51, pp.233-236, at p.235. Note also the Austrian Ultimatium of March, 1792 in Annual Register, 1792, Vol. 34, p.299.

[240] See Annual Register, 1792, Vol. 34, p.203 and pp.225-228. Woolsey, T.D. Introduction to the Study of International Law (Fifth edition, 1897), at p.50, outlines the motives of the King of Prussia in declaring war. These included the prevention of the "propagation of principles subversive of social order", "the encouragement and official publication of writings the most offensive against the sacred persons and lawful authority of sovereigns" and to "secure other governments against the criminality and incendiary efforts of madmen."

[241] Annual Register, 1792, Vol. 34, pp.263-272. The direct reply to this declaration was made on behalf of the French Government by M. Condorcet, who stated:

> "The French people, free to fix the form of their government, can in no respect have injured, while using this power, either the safety or the honour of foreign crowns. Are the rulers of other countries to include in the number of their prerogatives a right to oblige the French nation to give to the head of their governments the same power which they themselves exercise in their own dominions? Because they have subjects, do they mean to prevent the existence of freemen everywhere? How is it that they do not see that in allowing themselves to do everything for what they call the safety of crowns, they declare lawful everything that a nation can in like manner do for the liberty of another people."

Quoted from Stapleton, A. G. Intervention and Non-Intervention (1866), at p.19. See also Woolsey, op. cit. pp.49-50.

Although the monarchical European powers had unconditionally declared their disfavour towards events occurring in France, and to the creation of the new order in that state, Great Britain initially maintained a far less hostile disposition. Indeed, she seemed at first reluctant to renew her ageless rivalry with France, and a certain degree of support for the new regime existed within this state.[242] Combined with the assertion of a general foreign policy orientated towards non-interference, British participation in the forthcoming struggle seemed remote.

Numerous factors accelerated the British change of policy. Firstly, political agitation existed in Great Britain, and a number of public officials had suggested that France had been attempting to foment revolution in Great Britain. Although partial support for this allegation did exist, it would seem almost inconceivable that any radical factions in Britain were other than indigenous.[243] Secondly, the French authorities, having defeated the Austrian forces at Jemappes, had begun a programme of overt conquest.[244]

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[242] Grant, A.J. & Temperley, H. Europe in the Nineteenth and Twentieth Centuries (1933), pp.39-42.

[243] See generally, Laprade, W.T. England and the French Revolution, 1789-1797 (1909), pp.9-26.

[244] On November 19, 1792, the French Constitutional Assembly declared:

> "The National Convention declares, in the name of the French people that it will accord fraternity and assistance to all peoples who shall wish to recover their liberty, and charges the executive power to give to the generals the necessary orders to furnish assistance to these people and to defend the citizens who may have been or who may be harassed for the cause of liberty."

Anderson, op. cit. at p.130. As a supplement to this Decree, the Convention continued:

Without assigning any pretext for their actions, the French revolutionary forces overran Savoy, and converted it into the French department of Mont Blanc, and, having occupied Belgium, the French authorities subverted its civil institutions, and were preparing to incorporate it into France.[245] The French authorities also opened the navigation passage between the Scheldt and the high seas, which, by the stipulations of treaties with Holland, of which England was the guarantor, was perpetually to remain closed.[246]

British unease at these events was manifested in the speech by the English king at the opening of Parliament in December 1792, which expressed regret at the intention of France to excite disturbances in other states, and to

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[244] (cont'd)

> "(T)he French nation declared that she would treat as an enemy the people which, refusing to accept or renouncing liberty and equality, should wish to keep, to recall, or to negotiate with its prince or its privileged castes."

These Decrees were challenged by the governments of Europe, and particularly Great Britain, as being a gross violation of the law of nations. The French government subsequently sought to explain that the Decree of November 19, 1792, was directed against nations at war with France, and that it referred to revolutions, not casual revolts, in which the mass of peoples within those nations demanded assistance. See the note of M. Chauvelin to Lord Grenville, of December 27, 1792, in Annual Register, 1793, Vol. 35, p.115. See also Lauterpacht, H. Collected Papers (1977), Vol. 3, pp.284-286. It was upon these events that Phillimore concluded:

> "No State has a right to establish a form of government which is built upon professed principles of hostility to the government of other nations."

Phillimore, R. Commentaries Upon International Law (First edition, 1854), Part IV, Chapter I, Para. 388, p.315.

[245] See Senior, N.W. "History of the Progress of the Law of Nations in Europe", 1845, Vol. 77, Edinburgh Review, pp.303-373, at p.350.

[246] Treaty of Alliance between Great Britain and Holland, April 15, 1788 in Consolidated Treaty Series, 1786-1790, Vol. 50, pp.305-312.

disregard the rights of neutral nations.[247] An Order-in-Council was issued prohibiting the exportation of wheat to France, and two further statutes were promulgated restricting the freedoms of Frenchmen to travel throughout Britain and to conduct their business.[248]

However, despite domestic tension at the events occurring in Europe, in conformity with the general British policy of non-interference, attempts were made to placate the situation. As late as December 20 1792, the British Foreign Secretary, Lord Grenville, had attempted to avoid the necessity of British interference in the affairs of France on the condition that:

> "France rescind any acts injurious to the rights and sovereignty of any other nation, and give in some unequivocal manner a pledge of her intention no longer to foment trouble, or to incite disturbances against other governments."[249]

This offer was subsequently rejected, and two years later the British Foreign Minister, Pitt, reflected that "England was forced into war against her will".[250]

Political insularity led to the creation of a new policy by the French authorities, and a compromise foreign policy was sought by new leaders to protect the territorial integrity of France, whilst still adhering to the fundamental principles of the revolution. On April 13, 1793, the National Convention adopted the Decree on Non-Intervention. This provided that, as regards the reciprocal relations between France and other members of the international society of that period, France would abstain from meddling in internal domestic concerns. More precisely:

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[247] Annual Register, 1792, Vol. 34, pp.167-169.
[248] British Statutes at Large (Edited by Ruffhead), 1790-1794, pp.487-489 and pp.592-598. On the motives of the British government in adopting these measures, see Woolsey, op. cit. at p.51.
[249] Stapleton, op. cit. p.20.
[250] Parliamentary Register, 1792-93, Vol. 34, pp.379-382 and pp.384-395.

> "The National Convention declares, in the name of the French people, that it will not interfere in any manner in the government of the other powers; but it declares at the same time, that it will sooner be buried under its own ruins than suffer that any power should interfere in the internal regime of the Republic, or should influence the creation of the constitution which it intents to give itself."[251]

Although it may be difficult to reconcile the declaration of November 19, 1792, with the Decree of April 13, 1793, it must be borne in mind that a considerable shift had occurred in both France's domestic politics, and in her international standing. It was evident that those participating in the internal governmental structure recognized the threat to the continued existence of their nation, despite the short-term victories of the revolutionary forces. From this perspective, the long-term strategy of France necessarily involved the promulgation of such a policy.[252]

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[251] Anderson, op. cit. pp.171-184 (Emphasis added). This qualified principle of non-interference was adopted unabridged by the French Jacobins in their draft constitution of 1793. Under the terms of this proposal, the French constitution would have provided in Articles 118-119: "The French people is the friend and natural ally of the free peoples...It does not [however] interfere in the government of other nations; it does not permit other nations to interfere in its own." See Lauterpacht, op. cit. Vol. 3, p.286, where this learned author concluded that the act of November was a rash one which was also incompatible with the public law of Europe. As a result, in order to secure long-term strategic security, the Decree on Non-Intervention was promulgated.

The adoption and formulation of this principle of non-interference must therefore be evaluated as a political device, rather than a statement of *opinio juris*. But, since France still professed to succour insurgents opposed to incumbent monarchical regimes, the effect of this decree was undermined as an attempt to establish a near pacific foreign policy.

The legal pretext for the intervention in French affairs, which ultimately culminated in the Napoleonic conflicts, was originally proclaimed to be for the protection of the hereditary succession of the French monarchy, and to restore the balance of power once France had begun to establish her Empire.[253] Certain nations perceived the continued existence of the French revolutionary regime to be a direct threat to their security and ultimate self-preservation. In the Declaration of Piinitz, in 1791, the Emperor of Germany and the King of Prussia, had announced their intentions to forcibly and collectively interfere in the domestic concerns of France when the occasion appeared convenient.

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[252] See Rousseau, C. Droit International Public (1980), Tome IV, p.41.
[253] Wheaton, History, op. cit. at p.345.

Therefore, the conflict which resulted, and which lasted for almost a quarter of a century, had its origins in the declared and overt intention of certain continental powers to ignore the principle of sovereignty, and its collateral obligation of non-interference, and thereby violate the tenets of the law of nations as accepted at this time.

However, as France moved from its defensive posture, and into the attack, declaring war on Great Britain, the continued territorial aggrandizement of France gave cause for concern, and Britain engaged in the conflict to prevent the permanent imbalance of power in Europe. Had France successfully subjugated the mainland of Europe, then British vital interests, both foreign and domestic, would have been jeopardized.[254]

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[254] Winfield, in "The Grounds of Intervention in International Law", 1924 B.Y.I.L. pp.149-162, at p.152, cited the British participation in the coalition against France as a precedent for intervention for self-preservation. He claimed:

> "The war between Revolutionary France and Great Britain in 1792 serves as an instance of an intervention lawful upon grounds of self-preservation. The British Cabinet was induced to express its disapproval of the form of government typified by the French National Convention mainly because it announced in effect to the world that there was but one liberty and that France was her prophet. There was no intention, Pitt declared, if England had not been attacked, to interfere in the internal affairs of France."

B. NINETEENTH CENTURY PRACTICE AND THE HOLY ALLIANCE.

The Congress of Vienna in 1815 attempted to restore the balance of power in Europe.[255] With the successful conclusion of these agreements, Great Britain again returned to the pursuit of the general policy of non-interference which had previously been its general policy. Under the counsel of British Foreign Secretary, Castlereagh, non-intervention again became the core of British foreign policy. In a State Paper of May 5, 1820, he outlined future British foreign policy regarding events in post-Napoleonic Europe.[256] In Castlereagh's opinion, the victorious coalition had been established for the sole purpose of resisting the French destabilization of the balance of power in Europe. Consequently, the Alliance "never was...intended as a Union for the Government of the World, or for the Superintendence of the Internal Affairs of other States."[257] An abuse of power would necessarily result should the Alliance assume the mantle of the protector of dynastic succession.

However, he also acknowledged that the British adhesion to the principle of non-intervention was not absolute and in such circumstances where a genuine and substantial threat existed to the stability of Great Britain, which included the stability of the European balance of power, then Great

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[255] On the history of the Congress, see Webster, C. The Congress of Vienna (1920), especially pp.98-135.
[256] Parliamentary Papers, Vol. X, pp.71-74. See also Cambridge History of British Foreign Policy (Edited by Ward, A.W & Gooch, G.P, 1922), Vol. II, pp.623-633.
[257] Parliamentary Papers, Vol. X, p.72.

Britain would be prepared to intervene. However, this was no more than the logical consequence of the policy of non-interference in the light of the events of the previous three decades, and therefore, no more than a continuation of the British foreign policy in the late eighteenth century. But, where the threat to these principles was no more than an abstract or vague possibility, then intervention would be vitiated as being too remote.[258]

As a consequence of the successful arrest and reversal of French territorial aggrandizement, the balance of power in Europe was restored to the approximate *status quo ante bellum*, through the medium of the Congress of Vienna in 1815.[259] At this conference, the territorial order of Europe was demarcated in a form which was to remain fundamentally unaltered until 1914. In addition to the authoritative delimitation of frontiers, this gathering also unified and reorganized states, and restored dynastic successions.[260] This arrangement was ratified under the auspices of the four victorious powers - Great Britain[261], Austria, Prussia and Russia - although these powers eventually condescended to the participation of France in order to procure a meaningful and lasting consensus.[262]

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[258] Castlereagh believed that interference in the affairs of a state subjected to internal dissension, under the pretext that the revolutionary element would transcend national frontiers, was an illegitimate adoption of force since the perceived danger was merely anticipated and remote. See Temperley, H. The Foreign Policy of Canning, 1822-1827 (1966), pp.11-17.

[259] Consolidated Treaty Series, 1815, Vol. 64, pp.454-493. The General Treaty between Great Britain, Austria, France, Portugal, Prussia, Russia, Spain and Sweden, signed in Vienna on June 9, 1815, is translated in Isreal, op. cit. pp.519-575. The Congress of Vienna sought to restore the equilibrium of Europe by the creation of large kingdoms and the absorption of small independent states. In order to achieve this purpose, states were, in some instances, treated merely as so many square miles, with so many inhabitants, with little or no consideration being given to national sentiments, national identity or culture. The annexations of Norway to Sweden, of Genoa to Sardinia, of Venice to Austria, and the diminution of the territory of Sardinia, were among the most grievious violations of international justice afforded by the Congress. These actions were justified on the grounds that it was necessary to preserve the balance of power. However, the balance of power in Europe would have been equally satisfied by the establishment of a league or concert to protect the smaller states. Although the negotiation of this treaty has been cited as an instances of the predominance of the balance of

The Congress of Vienna was only one of a number of diplomatic conferences held by this assemblage, since certain issues remained unresolved. After the signature of the Acte Finale of this convention, the five powers found themselves jointly responsible for the administration of the multitude of affairs which required common international co-ordination.[263] Subsequent meetings were to be held since

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[259](cont'd) power principle, it is obvious that the same principle has been the pretext for much unjustifiable action. See Baker, S. First Steps in International Law (1899), pp.180-181.

[260] Amongst the most profound political acts of the Congress of Vienna, the following must be noted: the union of Norway and Sweden, and of Belgium and Holland; the reorganization and perpetual neutrality of Switzerland; the reorganization of a Germanic Empire composed of thirty-nine states arranged in a loose confederation; and the restoration of the old dynasties in France, Spain, Italy and Germany.

[261] Although Great Britain was a principal actor in these negotiations, and sanctioned the division of Europe according to the balance of power principle, this nation expressed dissent from the application of the principle to internal changes within existing states, particularly later at Troppau, Laibach and Verona. See Baker, op. cit. at pp.180-181.

[262] This concession was essentially attributed to the skills of the French negotiator, Tallyrand. See Taylor, op. cit. Para. 86, pp.114-115.

[263] These matters are explained at length in Butler, G. &

these powers believed that the responsibility for the reconstruction and order in Europe lay with them.[264]

These powers reconvened at Aix-la-Chapelle to discuss the withdrawal of the international force from the territory of France, and to ascertain reparations for which France had been deemed liable under the second Treaty of Paris.[265] This prestigious company reassembled at Troppau and Laibach, between October 1819, and January 1820, to consider questions relating to European internal revolution in Naples and Piedmont, and the re-establishment of autocratic monarchies in these states, as well as the proposed Austrian intervention in Sicily.[266] The final Congress in this series was held at Verona in October 1822.

Notwithstanding the limited success of the congress system of diplomacy in the post-Napoleonic settlement of Europe, political rivalries and divisions had become evident between the parties to the system, long before the termination of this system at Verona. In particular, a paranoid phobia of popular revolution had succeeded in seizing the imaginations of a number of European monarchies. In reaction to the profusion of such predilections, the

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[263](cont'd) Maccoby, S. The Development of International Law (1928), pp.351-356.

[264] See Hayes, C.J.H. "The League of Nations: The Historical Background", in Duggan, S.P. The League of Nations: Principles and Practice (1919), pp.18-49, at pp.33-36.

[265] First Treaty of Paris, April 11, 1814, in Consolidated Treaty Series, 1813-1814, Vol. 63, pp.120-123; and the Second Treaty of Paris, November 20, 1815, in Consolidated Treaty Series, 1818-1816, Vol. 65, pp.251-252.

[266] The events of the Congresses at Aix-la-Chapelle, Troppau and Laibach are described in Woolsey, T.D. International Law (Fifth edition, 1879), pp.51-54.

Emperors of Russia and Austria, and the King of Prussia, in 1815, established a fraternity known as the Holy Alliance. The self-proclaimed purpose of this union was the suppression of revolution, wherever manifested, and the collective protection of the established dynasties of Europe.[267] Persistent British adherence to the policy of non-interference automatically implied that membership in this community was fundamentally repugnant to professed British foreign policy, and, as the objectives of the alliance became more clearly defined, Britain could not avoid direct diplomatic confrontation with this group.[268]

The Holy Alliance genuinely believed that the best vehicle for the perpetuation of peace in continental Europe was the continued dominance of a homogeneity of monarchical governments throughout the region. This necessarily implied the arbitrary destruction and repression of liberal democratic governments. As a means to this end, the members of the Alliance agreed, in Article I of the Pact, that they would:

> "...remain united by the bonds of a true and indissoluble fraternity, and, considering each other as fellow countrymen, they will, on all occasions and in all places, lend each other aid and assistance; and regarding themselves towards their

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[267] See Phillips, W.A. The Confederation of Europe (1914), pp.148-156. On the international legality of the objectives of the Holy Alliance, see Smith, F.E. International Law (Fourth edition, edited by J. Wylie, 1911), pp.58-59.
[268] Grant & Temperley, op. cit. pp.178-185.

> subjects and armies as fathers of families, they will lead them, in the same spirit of fraternity with which they are animated, to protect Religion, Peace, and Justice."[269]

A unilateral right to interfere in the internal development of any state which departed from the sacred principles of dynastic succession, and deviated towards democracy, was asserted as legitimate by reference to the necessity to maintain peace and order in Europe.[270] In effect, this confederation prohibited the growth of democracy in any nation by arguing that such a regime would be so inherently abhorrent to the professed principles of the incumbent monarchies as to constitute an immediate danger to peace.[271] Such an argument was resonant of the claims of those parties to the Convention of Pilnitz, and France subsequently conferred her allegiance to these principles at Aix-la-Chapelle in 1818.[272]

Popular revolutions, advocating anti-dynastic principles, had materialized in Naples and Piedmont in 1820.

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[269] Hertslet, Sir E. Map of Europe by Treaty (1875-1891), Vol. I, pp.317-320; Consolidated Treaty Series, 1815-1816, Vol. 65, pp.199-202, at p.201. English translation in Manning, W.O. Commentaries on the Law of Nations (First edition, 1837), p.82.

[270] De Lima, F.X. Intervention in International Law (1971), pp.17-18.

[271] The general terms of this treaty can be interpreted as a condemnation of all popular movements in Europe in favour of political freedom. The ground upon which intervention would be prescribed was for the self-preservation of monarchical sovereignty, which this group assimilated with the nature of a state itself. See Lawrence, T.J. Documents Illustrative of International Law (1914), at pp.47-49.

[272] Taylor, op. cit. Para. 87, p.116.

In order to deliberate upon these matters, the Alliance powers convened at Troppau on October 20 and November 19, 1820. In a circular letter emanating from Troppau, the "Powers who had recently stifled Revolution", claimed that they exercised an undeniable right, in concerting together, to decide upon the means by which to remedy the problems caused in those states in which the overthrow of a Government had been caused by revolution.[273] Further, in the Protocol of Troppau, these powers declared, *inter alia*, that:

> "States which have undergone a change of government due to revolution, the results of which threaten other States, *ipso facto*, cease to be members of the European Alliance for legal order and stability. If, owing to such alterations, immediate danger threatens other States, the powers bind themselves, by peaceful means, if need be by arms, to bring back the guilty State into the Alliance."[274]

This declaration reiterated, in treaty form, the commitment of each participating power to derogate from the principle of mutual respect for sovereignty should revolution be fomented within the borders of a European nation, and a monarch be overthrown.

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[273] Hertslet, op. cit. Vol. 1, pp.658-661.

[274] Martens, Nouveau Recueil, General de Traites (1876-1908), Vol. V, p.644; British and Foreign State Papers, Vol. 8, pp.149. Translated in Phillips, op. cit. p.222. It is generally conceded that this statement was an abuse of the right of self-preservation at this time. As Westlake pointed out in his work, International Law (1904), Vol. I, at p.305: "This [statement] was an assertion of a right of self-preservation against the contagion of revolution; to deny to a nation the right of establishing for itself free institutions, by force if they cannot otherwise be attained, lest the example should be dangerous to autocratic governments in other countries."

After reconvening at Verona, these allies discussed the growing spirit of freedom and independence which had manifested itself throughout Europe, and especially in Spain. In another circular dispatch, they agreed to cooperate to "repel the maxim of rebellion, in whatever place and under whatever form it might show itself." Further, by secret compact, the ultimate desire of these allies was expressed as "to put an end to the system of representative governments" in Europe, and to also destroy "the liberty of the press."[275]

At the meeting at Laibach in 1821, Austria was authorized by the Alliance to suppress the liberal insurgents in Naples and Piedmont. In Naples, a military revolution had broken out, which successfully procured from the king an acceptance of the Spanish constitution and a united Parliament for Naples and Sicily, and in Piedmont, parallel events occurred.[276] Both interventions by Austria were successful, and the imposition of monarchical rule was reinstated. On the completion of this action, a circular despatch from Austria, Prussia and Russia, justified this action of the ground of the existence of a vast conspiracy against all established monarchical powers in Europe.[277]

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[275] Taylor, op. cit. Para. 87, pp.116-117.

[276] See Kent, J. Commentaries on International Law (edited by J.T. Abdy, 1877), pp.45-46.

[277] British and Foreign State Papers, 1820-1821, Vol. 8,

The British government denied that any general right of interference against revolutionary movements in independent states was sanctioned by international law, or could be made prospectively the basis of an alliance. In a despatch of January 10, 1821, the British Foreign Secretary, Castlereagh protested this policy of interference, proclaiming:

> "It should be clearly understood that no government can be more prepared than the British government is to uphold the right of any State or States to interfere, where their own immediate security, or essential interests, are seriously endangered by the international transactions of another State. But, as they regard the assumption of such a right as only to be justified by the strongest necessity and to be limited and regulated thereby, they cannot admit that this right can receive a general and indiscriminate application to all revolutionary movements, without reference to their immediate bearing upon some particular State or States or be made prospectively the basis of an Alliance."[278]

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[277] (cont'd) pp.1201-1205.

[278] British and Foreign State Papers, 1820-1821, Vol. 8, pp.1160-1162. Emphasis added. Despite the fact that the British Foreign Secretary was clearly alluding to actions which would be construed in contemporary international law as "intervention", the term "interference" was consistently employed by Castlereagh, and even by both his successors at the British Foreign Office - Canning and Palmerston. Indeed, the Spanish term "intervencion" is translated as "interference" in the despatches of 1822 on this matter. Since "intervention" as a technical term became common in Continental European legal terminology before its use in Great Britain, it must be concluded that the term is a foreign importation to Anglo-American international

Whilst the British Foreign Secretary was prepared to acknowledge that certain exceptions to the principle of non-interference did exist, he was not prepared to concede that the emergence of revolutionary forces in neighbouring states provided a sufficient pretext for interference.[279] The inherent uncertainty of allegations leading to interference gave rise to questions relating to the credibility of such a principle.

However, more profound reactions were evident relating to the liberal revolution in Spain. Forced into exile in France, the Spanish monarch, Ferdinand VII, petitioned the Alliance for assistance in subduing his people. The participants in the Alliance were summoned to Verona in October, 1822, to evaluate this situation and eventually these powers adopted a resolution which authorized the expedition of a large French force to cross the Spanish frontier, and, with the assistance of these forces, the Spanish monarch was reinstated.[280]

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[278](cont'd) jurisprudence. See Winfield, P.H. "The History of Intervention in International Law", 1922 (III) B.Y.I.L. pp.130-149, at p.135.

[279] For an extensive examination of Castlereagh's policy of non-interference as applied relative to the Holy Alliance, see Webster, C. The Foreign Policy of Castlereagh, 1815-1822 (1963), pp.217-256. In Kent, op. cit. at pp.44-45, the author interpreted this statement in the light of the international law of that period, and concluded that the British statement represented the content of law on this matter.

[280] Hertslet, op. cit. Vol. I, pp.658-661. On the legality of this action, Lawrence agreed with Kent. In his Principles of International Law (Seventh edition by Winfield, 1923), at Part II, Chapter I, Para. 68, p.132, this author stated:

> "When in 1820-1823 the Holy Alliance was crushing by means of Austrian troops movements in favour of political liberty in Naples, Piedmont and other

British foreign policy fundamentally questioned the continuance of the exercise of such rights of interference. Further, this opposition to the actions proposed by the Alliance was particularly grave since Great Britain was allied to all the members of the Alliance. But, the exercise of this purported right in Spain had been an extreme example of interference, since Spain would probably have settled her constitutional problems in a democratic fashion had the pro-monarchical forces not received such substantial foreign support.[281] The British reaction was a clear enunciation of the non-interference principle, but, single-handedly, Great Britain was helpless against the policy of intervention adopted by the European monarchies in the 1820s.[282]

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[280](cont'd) States, and inciting France to invade Spain in order to restore Ferdinand VII to the plentitude of absolute power, Great Britain and Canning "disclaimed any general right of interference in the internal concerns of independent nations". This was the true principle of the law of nations. Any real dangers to other states which may arise in the process can be dealt with under one or more of the recognized grounds of intervention."

[281] See Kent, op. cit. p.46. See Baty, T. The Canons of International Law (1930), at p.100, where the author commented that the unpopular nature of the governments which the Holy Alliance supported was the principal cause of the assertion in certain legal circles of the illegality of intervention to support an incumbent government against its revolted subjects.

[282] Butler, G. & Maccoby, S. The Development of International Law (1928), at pp.72-73, accredit this policy with the creation of the modern principle of non-intervention. Specifically, these authors stated:

> "The liberal powers in opposition [to these events] developed their challenge to a general right of intervention for the preservation of their institutions. It was from their line of conduct that the doctrine of non-intervention took its familiar form."

See also Westlake, op. cit. Vol. I, p.306.

The actions of interference manifested by the Holy Alliance were castigated by Great Britain as being a non-legal fiction. Canning clearly differentiated between collective self-defence and collective intervention. Collective self-defence was justified in the case of an imminent and direct threat to a member of an alliance, or to protect the fundamental balance of power. Collective intervention, as adopted by the Holy Alliance, therefore, had no legal justification, or political foundation. Intervention against a revolutionary movement in a foreign state was necessarily subjective and impermissible, in the absence of a collective right of self-preservation.

This difference of opinion relating to the nature of interference split the Holy Alliance, and contributed to the demise of international co-ordination in Europe as pursued through the medium of the Congress system.[283] Unable to arrest the fermentation of popular liberal and democratic forces throughout Europe, the self-imposed duty of interference to protect the dynastic heritage and succession of the European monarchies became an unsupportable burden which eventually led to the collapse of the Alliance. These difficulties had been substantially fortified by the British repudiation of the Protocol of Troppau, the protests against alliance collective interference, and the refusal to assist in the recolonization of Spanish America. Further pressure was brought to bear by the United States, whose President

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[283] Duggan, op. cit. pp.36-37.

Monroe unequivocally stated that the United States was willing to resist, by military force if necessary, any attempts by European powers to interfere in the American hemisphere for colonial motives.[284]

After the July Revolution, France accepted the principle of non-interference, and joined with Great Britain in the attempt to crush the purported legality of interventions to uphold the monarchical regimes of states.[285] Austria vigorously protested the creation of this joint policy, and the Austrian Foreign Minister, Metternich, complained against "the presumption of the French government, for its own convenience, to set up a new law of nations, which was nothing more than a complete overturning of all the rules which had until then guided the diplomacy of European States."[286] This new course adopted by France did not prevent the Austrian army from repeatedly interfering in Piedmont. However, this new policy was destined to prevail in the works of international jurists, as a fundamental tenet of the law of nations, and in several instances the potency of this principle was reiterated.

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[284] See Richardson, J.D. Messages and Papers of the Presidents, 1789-1897 (1896), Vol. II, pp.207-220. The final days of the Holy Alliance were recorded in Webster, op. cit. pp.469-505.

[285] See Lingelbach, W.E. "The Doctrine and Practice of Intervention in Europe", 1900 (16) Annals of the American Academy, pp.1-32, at pp.14-15.

[286] See Lingelbach, loc. cit. p.14.

C. PRINCIPAL ACTS OF INTERVENTION UNDER THE CONCERT SYSTEM.

Despite the demise of the Alliance and the professed principles of pro-monarchical intervention instances of interference did not abate and the principal pretext for intervention remained revolution, or political motives. A vacuum of authority had resulted with the dissipation of the Holy Alliance, which would not be filled by an institution of a permanent nature. Instead the Concert of Europe emerged which was not a coalition, nor a pact, but rather an understanding between the main European powers that the responsibility for peace remained with them.[287] In this sense, this organism did not differ from the motivations upon which the Congress system had originally been conceived.

To the fulfilment of these ends, these nations convened on a regular basis to discuss the maintenance of international order, to peaceably resolve potential or direct threats to the peace, and to uphold the balance of power in Europe. On the whole, this group was resigned to the perception of revolutionary groups as a matter for internal regulation, unless manifesting a menace to international peace. This was mainly due to the heterogeneous composition of the participants in this scheme, which embraced the complete spectrum of governmental orders, from absolute to liberal monarchies, to constitutional governments and republics.[288]

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[287] For a description of the Concert system from a theoretical and historical perspective, see Hinsley, op. cit. pp.213-237.

Although the Congress system had proved unworkable because of the wide ranging political ambitions of the European monarchies, its idealism continued in the form of this looser association. If the Congress structure had provided the earlier procedural framework for the pursuit of this policy, then the implicit common understanding between the participating powers, an emotion which was the essence of the Concert of Europe, fulfilled the role of substantive element of this process.[289] The Concert of Europe acknowledged that peace and order throughout Europe were attainable only through the co-operation of the so-called Great Powers, and attempted to facilitate this objective through the convening of a number of conferences and meetings.

The first demonstration of collective Concert intervention was provided by Russia, Great Britain, and France against Turkey in reaction to the massacre and suppression of the Greek Christians.[290] By the Treaty of Kucuk-Kainardji, of 1774, Turkey had conferred a number of rights upon Russia to guarantee the liberties and security of the Greek Christians of the Turkish Eastern Provinces.[291] A Concert coalition convened in London to consider the issue, and eventually agreed upon the terms of the Treaty of London, of July 6, 1827.[292] This compact confirmed the Russian right to protect these Greek nationals, and replied in the affirmative to the request from Russia for assistance in the enforcement of these rights, and the prevention of further abuses.[293]

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[288] Notwithstanding that the essence of British foreign policy was professed to be founded upon the principle of non-intervention in European affairs, Great Britain fully participated in this scheme, and indeed was instrumental in certain collective interventions undertaken by the Concert against other powers.

[289] See Albrecht-Carre, R. A Diplomatic History of Europe Since the Congress of Vienna (1951), pp.23-31.

[290] Ganji, M. International Protection of Human Rights (1962), pp.22-24.

On September 9, 1827, the Turkish fleet entered the Bay of Navarino and landed Egyptian troops to subdue the rebels. Upon the arrival of the combined fleets, a cessation of hostilities was agreed.[294] However, in spite of this, Turkish forces continued to commit atrocities, and when the Turkish fleet attempted to escape, it was annihilated by the combined firepower of the treaty parties.[295] Subsequently the *de facto* independence of Greece was recognized by the intervening states.[296]

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[291] Consolidated Treaty Series, 1772-175, Vol. 45, pp.349-401. This treaty conferred upon Russia the express right to make representations at Constantinople on behalf of the Christian inhabitants of the Danubian provinces, and also bound the Turkish Sultan to observe certain conditions on his treatment of his Greek subjects in the Greek archipelego. See Winfield, P.H. "The Grounds of Intervention in International Law", 1924 (V) B.Y.I.L. pp.149-162, at p.158.

[292] Consolidated Treaty Series, 1826-1827, Vol. 77, pp.307-315 and British and Foreign State Papers, Vol. 14, p.629. Translated in Hertslet, op. cit. Vol. I, pp.741-743. In the Preamble to the London Convention, the parties expressly declared their intentions to be:

> "...putting an end to the sanguinary struggle which...daily causes fresh impediments to the Commerce of the States of Europe, and gives opportunity for acts of piracy which not only expose the Subjects of the High Contracting Parties to grievous losses, but also render necessary measures which are burthensome for their observation and suppression."

[293] In reply to the publication of this agreement, Turkey declared that, while it was an unquestioned principle of law that no state had a right to interfere in the private affairs of another, it was also clear that, by law, every independent state was free to exercise unrestricted power over the regulations which it may frame for the government of its subjects. See Kent, op. cit. p.48.

Although these powers alleged that the intervention had been precipitated by the worsening affairs within the Greek provinces, ulterior motives cannot be eliminated.[297] Three

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[294] Kent, op. cit. pp.47-50.

[295] See Grob, F. The Relativity of War and Peace (1949), pp.82-93 and Brownlie, I. International Law and the Use of Force by States (1963), pp.30-31.

[296] This later act certainly constituted unwarranted intervention. Greece did not even achieve a *de facto* state of independence and, on the contrary, it is widely recorded that, at the moment of the collective intervention, the Greek rebels were on the point of succumbing to the Turkish forces. Even if the action could be justified as humanitarian intervention, it is difficult to reconcile this limited principle as justifying the creation of a new and independent state. Thus, the opinion stated by Harcourt, in "Neutrality or Intervention" in Letters by Historicus (1863), at pp.41-51, is particularly pertinent. This author stated:

> "The emancipation of Greece, effected by Europe, was an act of high policy above and beyond the domain of law. As an act of policy, it may have been, and probably was, justifiable; but it was not the less a hostile act which, if she had dared, Turkey might properly have resorted to war."

Criticism of this opinion is presented in Lorimer, J. The Institutes of the Law of Nations (1884), Vol. II, pp.43-44.

[297] A number of jurists have claimed that this action was legitimately one of humanitarian intervention. Thus Oppenheim, L. International Law (Eighth edition, by Lauterpacht, 1955), Vol. I, at pp.312-313, stated:

> "Great Britain, France and Russia intervened in 1827 in the struggle between revolutionary Greece and Turkey when public opinion reacted with horror to the cruelties committed during the struggle. Intervention was often resorted to in order to put a stop to the persecutions of Christians in Turkey."

Similarly, Wheaton in his Elements of International Law reasons for the action were given by the British government, including "the great evils pressing seriously upon her Majesty's own subjects" caused by piracy resulting from the disputed possession of the Levant, and the general anarchy caused by the prolonged contest.[298] Another motive suggested for the action was also occasioned by the desire, not to protect the rights of the Greek Christians, but to profit from the imminent contraction of the Turkish Empire.[299]

Collective interference was again manifested against the domestic affairs of the Netherlands in 1830. By the legislative acts of the Congress of Vienna, Belgium had been

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[297](cont'd) (Eighth edition by Dana, 1866), at Part II, Chapter I, Para. 69, p.87, cited this intervention as authority for his somewhat lukewarm support of a principle of humanitarian intervention. Another motive asserted for the intervention was given by Woolsey in his Introduction to International Law (Fifth edition, 1879), at p.60, where this writer claimed that the action was justified since "whatever a nation may lawfully defend for itself, it may defend for another, if called to interpose."

[298] Parliamentary Debates, New Series, Vols. XV, XVIII, XIX, XXII-XXV. Perhaps the best explanation for the action was given by Davis. This jurist explained the action in the following terms:

> "If there ever was a time when it behooved the civilized world to make bear its arms and raise the sword of retributive justice over any nation, it was the early part of [the nineteenth century] as to Turkey in the affairs of Greece. The great powers of Europe intervened. But while in reality they intervened for the purpose of stopping the sanguinary massacres which were then making the eastern waters red with blood, the pretext and legal justification on which they acted were that Turkey did not stop piracy in the Levant."

Davis, C.K. A Treatise on International Law (1901), p.100. It would therefore appear that these collective powers did not believe that the principle of humanitarian intervention could justify this action, and consequently this negates the proposition that the action in respect of Greece constituted *opinio juris* for humanitarian intervention.

[299] Cambridge History of British Foreign Policy, Vol. II, pp.83-106.

ceded to the Dutch Kingdom.[300] Since the interests of these nations were not given equal consideration, it was hardly surprising that national forces began work to dissolve this union, and around October, 1829, the provisional Belgian government, which claimed to speak for the majority of the population, unilaterally proclaimed the independence of the Belgian provinces.[301]

King William of the Netherlands called upon the five great powers to defend the work originally undertaken at the Congress.[302] Cognisant of the potential threat to the balance of power should France successfully annex the province under the guise of humanitarian assistance, Great Britain requested that a conference be held in London to deal with the impending situation.[303] These powers ultimately resolved that the Kingdom of the Netherlands should once again be partitioned, and that the resulting state of Belgium should be independent, and perpetually neutral, under the guarantee of all the participants at this conference.[304]

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[300] Cambridge History of British Foreign Policy, Vol. II, pp.155-160.

[301] Butler & Maccoby, op. cit. pp.432-434.

[302] See British and Foreign State Papers, 1830-31, Vol. XIX, p.749.

[303] The events of this conference are described in Webster, C. The Foreign Policy of Palmerston, 1830-1841 (1969), Vol. I, pp.104-147.

[304] Protocol of London, February 19, 1831, in Hertslet, op. cit. Vol. II, pp.858-871. In this convention, the great powers formulated the principle which justified their collective actions in the following terms:

> "Every nation...has its separate rights, but Europe also has rights given her for the maintenance of peace and order of society."

See Harcourt, op. cit. at pp.43-45 and Stowell, E.C.

This resolution was rejected by the King of the Netherlands, who vigorously attempted to resist the settlement. Consequently, measures of coercion were applied, and on October 22, 1832, Great Britain and France attacked the city of Antwerp and imposed an embargo blockade.[305] Although the city was captured in December 1832, it was not until May 1833, that the King bound himself to the arrangements settled by the London Conference. After lengthy negotiations between all concerned parties, a convention was signed between Holland and Belgium in 1839, in which Article VII reiterated the proviso that Belgium must remain perpetually neutral.[306] This agreement was confirmed by the five great powers, and thereby Belgium assumed the role of a buffer state between the northern provinces of France and the expanding German confederation.

The involvement of Great Britain in the internal affairs of the Netherlands was an obvious derogation from the professed policy which it had previously advocated. On February 18, 1831, Palmerston attempted to justify British participation in the interference in the following terms:

> "There was nothing in the principle of non-interference, fairly and reasonably laid down,

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[304](cont'd) Intervention in International Law (1921), p.283.

[305] The collective actions of these powers were not in accordance with the international law of that period. The coercion applied to the Netherlands to desist when she had almost subjugated the Belgian revolution was interference in the internal sovereign rights of that state without sufficient justification. See Stowell, op. cit. pp.282-283.

[306] Consolidated Treaty Series, 1838-1839, Vol. 88, pp.427-443, at p.432. See also Temperley, H. & Penson, L.M. Foundations of British Foreign Policy (1938), pp.88-100.

> which prescribed to a State the absence of all interference in what passed in a neighbouring country, when that which was passing concerned the interests of the other party; and if Belgium chose a Sovereign who might become dangerous to the neighbouring States, those States had a right to say "Such a person to us will be dangerous, and such a person we refuse to recognise,""[307]

If France had effectively annexed Belgium, then the buffer zone between France and the German Empire would have been removed, and this was offered as a pretext for the deviation from the principle of non-interference enunciated in British foreign policy.[308]

Clearly Belgium had been effectively annexed to the Netherlands by the treaties created at the Congress of Vienna. Therefore, it was a subject-portion of the sovereign of the Netherland's dominions. The intervention had only been successful because the Dutch government had shown itself to be ineffective in maintaining order within the provinces. This had been shown in its request to the parties to the Treaty of Vienna for assistance. A flagrant act of unlawful intervention appears to have been committed in this episode, but one in which the appeal to higher principles than that of international law appears to have been advanced. In effect, the individual rights of the one state were nullified by the threat of conflict between a number of powers, and the desire to maintain the peace in Europe.[309]

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[307] Parliamentary Debates, Third Series, pp.702-703.
[308] On the ultimate *quid pro quo* for the great powers, see Woolsey, op. cit. p.59.

A third intervention was undertaken under the auspices of the Concert powers after the Crimean War. The Conference of Paris was held in 1860, and was attended by Austria, France, Great Britain and Turkey, with a mandate which included the discussion of the problems of Syria regarding the protection of the Christians.[310] With the majority agreement of the Great Powers, France was authorized to intervene in Syria to protect these individuals from abuse and persecution.[311] At the conference, Turkey adamantly protested this action, but her efforts to assert a plea of domestic jurisdiction again proved unsuccessful. Further interference in the Turkish Empire was occasioned between 1866 and 1868 as the various powers of Europe, excluding Great Britain who returned to her vague policy of non-interference and neutrality, demanded from Turkey the improvement of the living conditions of the Christians of Crete.[312] Indeed, these people had already revolted in protest against their Turkish overlords, as a reaction to their unequal treatment, and later declared themselves united with the Hellenic nation. Although this interference remained fundamentally diplomatic, this coercion was sufficient to procure the submission of the Turkish sultan, who granted a constitution for the administration of the island, and granted substantial rights and privileges to the Christians.[313]

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[309] See Kent, op. cit. p.55.
[310] See Seventh Article of the Treaty of Paris, in Hertslet, op. cit. Vol II, pp.1250-1265 and Article Two of the Separate Treaty between Great Britain, France and Austria, in Hertslet, op. cit. Vol. II, pp.1280-1281.
[311] Ganji, op. cit. pp.24-26. See also British and Foreign State Papers, 1860-1861, Vol. LI, pp.278-279.
[312] Ganji, op. cit. pp.26-29.

Further collective intervention under the Concert scheme was envisaged as a consequence of the Constantinople Conference of 1876-77.[314] This conference attempted to settle, *inter alia*, the question of the treatment of the Christians of Bosnia, Herzegovina, and Bulgaria, who had revolted against their oppression.[315] Under the proposals of the parties at the Conference, an international commission was to be established in order to supervise Turkish administration of the area. However, Turkey refused to accept the proposal, and eventually Russia intervened in support of the insurgents.[316] The six powers reconvened at London to consider this new state of affairs.[317] After substantial deliberations, this group produced the London Protocol which called on Turkey to observe its obligations towards the Christians of the Eastern Provinces.[318] This was rejected, and Russia unilaterally declared war upon Turkey.[319]

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[313] British and Foreign State Papers, 1866-1867, Vol. LVIII, pp.137-178.
[314] The Proces-Verbaux of this meeting are reproduced in British and Foreign State Papers, Vol. LXVIII, pp.1114-1206.
[315] See Stowell, op. cit. pp.127-136.
[316] Taylor, op. cit. Para. 95, pp.125-126.
[317] British and Foreign State Papers, 1875-1876, Vol. LXVIII, pp.823-824.
[318] Protocol of London, March 31, 1877, Hertslet, op. cit. Vol. IV, pp.2563-2567.
[319] Protest against the London Protocol by Turkey is reproduced in Hertslet, op. cit. Vol. IV, pp.2568-2575. See

Once defeated, Turkey was compelled to sign the Treaty of San Stefano, 1878, which recognized the occupation of Bosnia and Herzegovina by Austria-Hungary, and which granted independence to Montenegro, Serbia and Roumania.[320]

Although this was not an instance of actual physical collective military intervention, the action was collective in the sense that the Great Powers had sanctioned Russia's behaviour, and no Power offered assistance to Turkey in the forthcoming conflict with Russia.[321]

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[319](cont'd) also British and Foreign State Papers, 1875-1876, Vol. LXVIII, p.844. In the Gortchakoff circular despatch of April 7-19, 1877, the reasons behind the Russian declaration of war were revealed. After describing the ill-treatment of the Christian population and the futile efforts of the great powers to persuade Turkey to institute reforms, the despatch continued:

> "In assuming this task, our august master fulfils duties imposed upon him by the interests of Russia, whose peaceful development is hindered by the permanent disturbances of the East. His Imperial Majesty has the conviction that he responds at the same time to the sentiments and interests of Europe."

[320] Hertslet, op. cit. Vol. IV, pp.2672-2696. See also Holland, T.E. Studies in International Law (1898), pp.226-250.

[321] Indeed the Russian action was perceived by the British government as being illegal. In his reply to the earlier despatch in which Russia had outlined her motives for resorting to war, Lord Derby stated:

> "In taking action against Turkey on his own part, and having recourse to arms without further consultation with his allies, the Emperor of Russia has separated himself from the European concert hitherto maintained, and has, at the same time, departed from the rule to which he himself had solemnly recorded his consent."

D. UNILATERAL ACTS OF INTERVENTION.

The existence of such collective acts of intervention does not, of course, imply that unilateral intervention is a recent phenomenon. However, in cases of unilateral intervention from this era, the preponderance of such actions create problems for the determination of constructive conclusions, and, further, do not illustrate the underlying motives for such actions in the same way as examples of collective interference. Numerous occasions of individual interference exist in the history of international relations, and in this context the most obvious and notorious should be considered.

In 1826, Britain overtly provided armed assistance to the incumbent government of Portugal in an attempt to circumvent the fomentation of a coup, overtly abetted by the incumbent Spanish government, and which could have succeeded in installing the absolute pretender Don Miguel upon the Portugese throne.[322] In response to these threats a substantial number of troops were dispatched to uphold the government in Lisbon. This intervention was justified by the British government as a demonstration of support of an old ally and under a number of treaty obligations owed to Portugal.[323]

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[322] Kent, op. cit. pp.46-47.

[323] In justifying this action, Canning made the following statement:

> "His Majesty disclaims the right, and abjures the intention of interfering in the internal concerns of any nation. But His Majesty will not endure that foreign force or foreign intrigue shall introduce confusion and civil war into a country with which

The legal character of this interference related to the British interpretation of its treaty obligations, and therefore the intervention was, *ex facie*, justified as originating from the obligations of alliance conferred upon Great Britain.[324] The defence of an ally against aggression appeared, therefore, to represent an exception to the British policy of non-intervention, and possibly this would have applied even in the absence of treaty stipulations.[325]

Great Britain again interfered, although in a novel manner, in the affairs of Spain in 1834. Although the Portugese revolution had been prevented by the earlier intervention, a revolution in Spain had been substantially more successful. In the light of the threat of these forces against the government of Spain, both Portugal and Spain petitioned Great Britain and France for an extension of the terms of the treaty which created the Quadruple Alliance to

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[323](cont'd) Great Britain has been for centuries in relations of the strictest amity and alliance, and whose Government has not given any just cause of offence either to Spain or to any other Power." Hertslet, op. cit. Vol. I, p.760. This action has been defended as legitimate by Lauterpacht, E. in "Intervention by Invitation", 1958 (7) I.C.L.Q. pp.104-110, at p.106.

[324] Speech by Canning in the House of Commons, Parliamentary Debates, New Series, 1826-27, Vol. XVI. p.369.

[325] Note the words of Oppenheim, in International Law (Eighth edition, Lauterpacht, 1955), Vol. I, Para. 134, p.305, where the author stated:

> "[I]ntervention must neither be confused with good offices, nor with mediation, nor with intercession, nor with co-operation, because none of these implies dictatorial interference. Thus, for example, in 1826, at the request of the Portugese Government, Great Britain sent troops to Portugal in order to assist that Government against a threatening revolution on the part of the followers of Don Miguel."

include Spain.[326] In reply to this request the terms of that agreement were extended to encompass Spain, and France agreed to adopt measures to interdict the supply of materials and support from its territory to the rebels. However, Britain went further, and agreed to furnish the necessary arms and munitions to support the government, and also promulgated an Order-in-Council which suspended the operation of the Foreign Enlistment Act, thereby permitting the enrolment of a substantial body of men to enlist under the service of the Spanish Crown.[327] In the House of Commons, the supporters and opponents of these measures vigorously debated the legality of these actions[328] , and the policy of supporting a government by the creation of a mercenary force was also questioned. Lord Palmerston, in defending the action, stated:

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[326] Hertslet, op. cit. Vol. II, pp.941-944.

[327] Enlistment Act Waiver, June 10, 1835, British and Foreign State Papers, Vol. XXIII, p.738.

[328] In opposing this policy, Sir Robert Peel stated:

> "The general rule on which England has hitherto acted is non-intervention, the only admissible exception to it being cases where the necessity is urgent and immediate, affecting, either on account of vicinage or some special circumstances, the safety and vital interests of the State; to interfere on the vague ground that British interests would be promoted by intervention, or the plea that it would be for our advantage to re-establish a particular form of government in a country circumstanced as Spain was, is to destroy altogether the general rule of non-intervention, and to place the independence of every weak power at the mercy of a formidable neighbour."

In this context, it would certainly appear that this opinion was the one which most conformed to the international law of this period, particularly as stated in the writings of the jurists of this time. Parliamentary Debates, Third Series, Vol. XXVIII, pp.1133-1163.

> "In the case of a civil war, proceeding either from a disputed succession or from a long revolt, no writer on national [sic] law denies that other countries have a right, if they choose to exercise it, to take part with either of the two belligerents. Undoubtedly it is inexpedient to exercise that right except under circumstances of a peculiar nature. The right however is general; if one country exercises it another may. The present measure establishes no new principle and creates no danger as a precedent."[329]

This historical account must be considered as illustrating the British government's perception of the law in this respect. However, the exact nature of the act of intervention is unclear. Were the measures adopted by Great Britain sufficient to amount to intervention at this time? The opinion expressed by the British Foreign Secretary remains contentious, since it amounted to the statement of a general right of a neutral to participate in a civil war on behalf of one or other of the belligerents.

Another example of British unilateral deviance from its alleged policy of non-intervention is provided by its actions against the Turkish Empire in 1838. The Sultan of Turkey had, for some considerable time, been in contention with his powerful subject, Mehemet Ali, the Pacha of Egypt. This controversy had flourished into a military confrontation, in which the Pacha had prevailed. Upon the demand of further concessions from the Pacha of Egypt, the Sultan decided to attempt to restore the Empire to its former glory, and despite of the strength of his rival, the remonstrations of Great Britain and France, and the probable interference by Russia through the Treaty of Unkiar Skelessi[330] , the Turkish forces again attacked Egypt on June 8, 1839.

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[329] Parliamentary Debates, Third Series, Vol. XXVIII, pp.1162-1163. With respect to the phrase "national law", this must be equated to international law. The opinion stated by Palmerston appears to support the general right of a neutral to participate with one or one of the belligerents in a civil conflict.

This conflict was alleged to threaten to irrevocably alter the stability of the balance of power in this region. The possibilities of the irrevocable increase in the sphere of influence of the Russian Czar had raised profound worries amongst a number of European states.[331] Britain and France both believed that should the Turkish Sultan be defeated by the Egyptian Pacha, then Russia would intervene on behalf of its Turkish ally, and once the Russian forces were installed, they would be extremely difficult, if not impossible, to displace. Therefore, the independence, and perpetuation of the existing Ottoman Empire was perceived as an essential element of the balance of power.

As a consequence of these events, the Concert powers proposed a potential resolution to this issue, which was presented to both parties.[332] At a convention held at London in July 15, 1840, it was agreed that in the event of the parties refusing to accept this proposal, measures should be agreed on as to the enforcement of the arrangement.[333] This involved the interdiction of communications between Egypt and Syria, and the prevention of the transportation of troops by sea. As a result, Austrian and British naval forces were deployed to assist the forces of the Sultan, in order to prevent any further capitulation.

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[330] Hertslet, op. cit. Vol. II, pp.925-928.
[331] Cambridge History of British Foreign Policy, Vol. II, pp.161-181.
[332] Annual Register, 1840, Vol. LXXXII, p.161.

Upon the refusal of Mehemet Ali to accept mediation, the allied forces were dispatched to blockade the area in pursuit of this agreement. After a number of military defeats, Mehemet Ali was compelled to submit. However the Sultan refused to accept the terms of peace, and the allied forces were then turned against him to compel him to accept the terms. By the results of these actions, first by the coercion of the Pacha, and secondly against the Sultan himself, Great Britain, who was instrumental in designing the agreement and in effectuating the policy, effectively intervened in the internal affairs of the Turkish Empire.

The British Foreign Secretary justified these actions in the following terms:

> "The Sultan, having shown himself unable to resist in the field the attacks of the Pacha, it became necessary for him to throw himself on some other Power, and the only choice we and the other Powers

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[333] Consolidated Treaty Series, 1840, Vol. 90, pp.285-292. See Wheaton, H. Elements of International Law (Eighth edition by Dana, 1866), Part II, Chapter I, Para. 70, at pp.98-99.

> had, was to give by common consent to the Sultan the general protection of the powers of Europe, or to allow him as in 1832, to resort to the support of one Power, which, by affording him assistance under such circumstances, would afterwards acquire an undue preponderance in its future relations with Turkey."[334]

This fear of the irrevocable transfer of the balance of power to Russia was the primary motivation for the British interference. Although the support for such a principle was irreconcilable with the position asserted by the British government earlier at Verona, the British government attempted to extend a teleological interpretation of the principle of intervention in self-defence, in order to excuse interventions to restore the balance of power as being somehow comparable.

The legitimacy of these actions is questioned because of a number of factors. Firstly, although the intervention appeared *ex facie* to be collective, general disagreement existed as to the appropriate solution to the problem. Eventually the armed interposition took place because one party to the conflict refused to submit to terms which it believed to be fundamentally inequitable. Further, it is difficult for states such as Great Britain and France to justify such intervention on the ground that the balance of power in Europe was disturbed, since the events in the

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[334] Stapleton, op. cit. pp.72-73.

Turkish Empire, vis-a-vis Russia, were not of an immediate danger to the security of these states. The statement of purpose made by the British Foreign Secretary stands in marked contrast to the earlier pronouncements of policy made by Castlereagh and Canning in similar situations.

Despite the previous support of the British government towards the constitutional monarchical government installed in Portugal, powerful opposition to this order had reemerged by 1847, and a British offer of mediation was accepted. However, the insurgent forces repudiated such a settlement, and with the continuance of hostilities, the Portugese government appeared insecure. On the rejection of these terms, the British government dispatched a naval squadron to engage the rebels in their stronghold of Oporto, and with the assistance of a Spanish contingent these combined forces subdued the rebellion.

Again the British Foreign Secretary claimed that this intervention was justified upon the claims of Portugal to be the ancient ally of Great Britain. In this context Palmerston continued:

> "The object of our interference was a recall of the Parliament, in which the people could state their grievances and restore the battles of political party to the legitimate arena of the Senate. In consequence of these views the intervention was not confined to the forcible termination of the rebellion. The London Conference insisted on the

> formation of a new ministry prepared to concede liberal measures of reform to the country."[335]

This intervention was thus undertaken for the purpose of pro-liberal government, and does appear as a striking illustration of British opportunism to acquire a politically similar government in a proximate state.

Great Britain was, however, by no means alone in flexing the principle of non-interference in a subjective manner. The Austrian monarchy, despite the demise of the Holy Alliance, still advocated the professed cause of intervention in support of monarchical regimes, and to terminate the spread of liberal revolutionary sentiments throughout Europe. To this end, the Austrian forces had intervened in the affairs of the nation states of Italy under the authority of the Alliance, as delivered at Liabach, in 1822. The Austrian forces continued to exercise this mandate, and between 1831 and 1832, the inhabitants of Bologna, Modena, Riggio, Ancona, and Parma, were subdued by these forces, and the revolutionary liberal movement suppressed. Again the professed objective of these continuous penetrations was stated to be the desire to support the "legitimate authority against the horrors of anarchy".[336] However, the fear of the spread of the revolutionary cause towards Lombardy was almost certainly the source of the intervention.

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[335] See Parliamentary Debates, Third Series, Vol. XCIII, pp.1202-1214, and also the Protocol of the Conference of May 21, 1847, which is reproduced in British and Foreign State Papers, 1846-1847, Vol. XXXV, p.1110.

[336] See Kent, J. Commentaries on International Law (Edited by J.T. Abdy, 1877), p.56. For a full account of these events, see Alison, P. History of Europe, Vol. IV, Chapter 25 amd Vol. V, Chapter 29, as well as Annual Register, 1832,

The French government was not indifferent to these unwarranted acts, and declared that French counter-intervention was justified to protect French interests.[337] The various Italian states were, therefore, notified of the potential French support, and were further fortified in the British declaration which provided:

> "Foreign occupation, on which the court of Rome relies, cannot be indefinitely prolonged, nor can auxiliary force suppress the discontent of a whole population; and even if such means were likely to succeed it is not the kind of pacification which the British government intended to help to bring about."[338]

Although Austrian aggression had been pacified in this region, in 1849 Austria advanced her military outposts to the frontiers of the Papal and Tuscan states in order to circumvent the implementation of a schedule of proposed liberal reforms conceded by the Italian authorities. In an unanticipated move, the constitutional government of France despatched a substantial body of troops to maintain the government of the Pope against insurgency. This strange alliance was justified by France by stating:

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[336](cont'd) Vol. 74, pp.391-397.

[337] British and Foreign State Papers, 1831-1832, Vol. XIX, p.1428.

[338] British and Foreign State Papers, 1832-1833, Vol. XX, p.1367.

> "The French intervention in Rome was in accordance with the immemorial policy of France in Italy, at Ancona, and at Civit Vecchia; the liberal intervention of a French army having prevented the despotic intervention of an Austrian one."[339]

Throughout the nineteenth century, a considerable catalogue of interventionary acts was also accumulated by the colonial powers and their confederates, against the fledgling republics which had been established in Central and South America.[340] Almost invariably, where these interventions occurred, the European powers appeared to apply a different standard of international law in their relations which these states, even until the latter part of the nineteenth century. The implications of these actions entailed substantial connotations for the development of principle of non-intervention, and therefore separate treatment of this phenomenon is merited.

Certain significant conclusions may legitimately be drawn from this description of the political history of Europe, and the evolution of the principle of non-intervention. Most notably, acts of coercion, which were termed interventions, were almost invariably, at this period, the product of the leveling of force by a large power against a considerably smaller state, or revolutionary movements, these states or groups being considerably more numerous in Europe than today. Further, the motivations for such acts appear almost invariably ideological or partisan.

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[339] Annual Register, 1849, Vol. 91, p.299.
[340] See text below, pp.241-258.

Another inference to be drawn from this history of events is that, in the context of the relationships of the great European powers *inter se*, the use of force against the territorial integrity or political independence of these powers was rarely classified as intervention. Further, only on three brief occasions in the century from 1815 to 1914 were actual wars, in the technical sense of the term, fought by the great powers amongst themselves: France, Great Britain and Turkey against Russia between 1854 and 1856; Prussia and Italy against Austria in 1866; and Prussia against France between 1870 and 1871.[341] The essence of intervention was, therefore, an imbalance of power between the intervening power and the victim state. This occasionally took the form of a coalition of powers against a single smaller power, such as were the instances of intervention against a weak Turkish Empire. Alternatively, intervention was common by one great power against a far smaller, yet no less sovereign, nation. This latter development was a particularly odious phenomenon where it concerned the interference by the colonial European powers in the affairs of the America continents which were almost invariably powerless against such superior militaristic imperialistic forces. Where such a displacement of power existed, interference was most probable. The existence of this uncomfortable scenario gave impetus to the attempts of certain Latin American nations to attempt to enshrine a principle of absolute non-intervention in international law.[342]

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[341] These conflicts were settled by the following instruments: Peace of Paris, March 30, 1856, in Consolidated Treaty Series, 1855-1856, Vol. 114, pp.409-420 (Translated in Oakes, A. & Mowat, R.B. The Great European Treaties of the Nineteenth Century (1918), pp.176-184); Peace of Prague, August 23, 1866, in Consolidated Treaty Series, 1866-1867, Vol. 133, pp.71-88 (Translated in Oakes & Mowat, ibid, pp.251-266); and the Peace of Frankfurt, May 10, 1871, in Consolidated Treaty Series, 1871-1872, Vol. 143, pp.163-198.

On the eve of the First World War, intervention as a term of art, was applied to the instances of coercion applied by certain powers against far inferior nations, in order to induce certain given effects, and usually motivated by political desires. In the final analysis, European political history made little contribution in the eighteenth and nineteenth centuries in the development of the legal principle of non-intervention, other than to furnish certain writers with materials with which to substantiate their hypothesis. Further, the correlation between the political history of this period in Europe, and the legal principles espoused by the jurists of this era, appears difficult to identify and isolate. As Europe prepared to plunge into the fires of war, the development and refinement of the concept of non-intervention was abdicated to the developments which had already occurred in Latin America, and which were about to unfold elsewhere.

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[342] See text, below, chapters 8 and 10.

VII. THE INTERPRETATION OF NON-INTERVENTION IN LATE 19TH AND EARLY 20TH CENTURY INTERNATIONAL LEGAL LITERATURE.

A. THE INTERNATIONAL SOCIETY OF THE PERIOD.

The historical epoch circumscribed by the eclipse of the first half of the nineteenth century and the progression towards global conflagration in the spectre of the First World War, was one which witnessed a remarkable increment in international intercourse and co-operation. Although a number of factors contributed to this development, undoubtedly a principal stimulant was the minimal direct military confrontation on a major scale between those powers which supervised the fragile and unstable balance of power in Europe.[343] This hiatus in international political history awakened the conscience of politicians, statesmen, diplomats and other international decision-makers to the society of states regulated by international legal order.[344]

Accompanying this popular awareness of the potential of international regulation was an unprecedented scale of direct state participation in the international norm-creating process. As Hershey observed in 1921:

> "The half century beginning with the Declaration of Paris in 1856 and ending with the London Conference

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[343] For a comprehensive analysis of the political developments of this era, and their relationship to international law, see Vollenhoven, C. van. The Law of Peace (1936), pp.113-154.

[344] See Oppenheim, L. "The Science of International Law: Its Task and Method", 1908 (2) A.J.I.L. pp.313-356, at pp.323-324, where this author discusses the popularization of international law at this period.

> in 1909 has seen greater progress in the direction of internationalism and more successful attempts to improve and codify International Law than any other in history, and possibly more than all previous half centuries combined."[345]

Naturally the non-intervention norm, in the particular form in which it existed at this time, has to be evaluated in the light of these accommodations.[346]

Increased state participation in international transactions was demonstrated by the nascence of a remarkable variety and diversity of both public and private international organizations and conferences, dealing with a wide range of administrative, economic and social matters. Although international conciliation had earlier been achieved through arrangements such as the Congress of Vienna in 1815, and latterly in the Concert system which followed, such conferences had no permanent administrative structure.[347]

However, beginning with the First International Sanitary Congress held at Paris in 1851, an extensive history of international conventions followed which dealt with a remarkable variety of concerns other than issues of security.[348] As a result, the first permanent international public organizations were being constructed, endowed with their own constitutional structures. In 1865 the Universal Telegraphic Union was founded which was the first international organization which had a mandate to potentially qualify as a truly universal organism. Prior to the outbreak of global conflict, several other international institutions were established, including the Universal Postal Union, in 1874, and the European Union of Freight Transportation, in 1890.

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[345] Hershey, A.S. The Essentials of International Public Law (First edition, 1921), at p.74.

[346] For a discusion of some of the more important developments, see Jennings, R.Y. "The Progress of International Law", 1958 (XXXIV) B.Y.I.L. pp.334-355.

[347] A concise examination of the Congress system is provided in Mangone, G.J. A Short History of International Organizations (1954), pp.34-60.

Although the specific mandates of these organizations were restricted to issues closely linked to the expansion of communications and commerce, the successful inauguration of these institutions evidenced closer international cooperation and participation amongst nations in the creation of a minimum infrastructure in international relations.[349] Further, this expansion in international co-ordination was complemented by the regular assembling of quasi-permanent meetings, including the four Hague Conferences on private international law, between 1893 and 1904, and the initiation of the Pan-American Congress Series in 1890.[350]

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[348] See Jacobsen, H.K. Networks of Interdependence (1979), pp.30-40 and Reinsch, P.S. "International Public Unions and Their Administration", 1907 (1) A.J.I.L. p.579-623.

[349] See Groom, A.J.R. "The Advent of International Institutions", in Taylor, P. & Groom, A.J.R. International Organizations (1978), pp.11-27, at pp.15-24.

[350] The Four Hague Conferences were held in 1893, 1894, 1900 and 1904, and the documents and proceedings are collected in four volumes entitled Actes De La Conference De La Haye Pour

The proliferation of non-governmental organizations during this period also cannot be ignored. Although not representative of the intentions of states, and therefore not evidence of *opinio juris*, certain such institutions substantially contributed in their own fashion to the stabilization of international relations. Despite their cultural and scientific natures, these organizations facilitated international intercourse, and thereby made their own unique contribution.[351] In the specific field of international law, one particular institution personifying this process was the Institute of International Law which is composed of a number of internationally respected and authoritative jurists. The Institute, established in 1873, has as its purpose, to serve as an organ "for the legal opinion of the civilized world on the subject of international law."[352] Through academic endeavour, these jurists collectively promoted resolutions on certain controversial or difficult aspects of international law, a function which the International Law Commission has adopted today in an official capacity.[353] Although these documents and drafts were not representative of the opinion of any individual nations, the authority of these statements was

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[350](cont'd) Le Droit International Prive.

[351] See generally, Lador-Lederer, J.J. International Non-Governmental Organizations (1963), pp.11-53.

[352] Scott, J.B. Resolutions of the Institute of International Law (1916), p.xvii. This publication is a compendium of the workings and declarations of this private organization, and, in connection with non-intervention, see especially, pp.157-159.

[353] Briggs, H.W. The International Law Commission (1965), pp.25-214.

derived from the persuasive value which emanated from the respect for the collective opinions of geographically and culturally diverse distinguished jurists.

These governmental and non-governmental institutions made a distinct contribution to strengthening international bonds by establishing a network of global interdependence. A large diversity of subject matter was encompassed by the different mandates of these institutions, including international waterway administration, railway transportation, international communications, international patent facilitation, and international trade and commerce.[354] These activities are evidence of, and substantiate, the dramatic increase in international intercourse at this period.

The increase in transnationalism and, to a certain degree, in international legalism was further attested to in the creation of facilities for the resolution of international disputes through pacific procedures. After the successful resolution of the Alabama Claims Arbitration, in 1872[355], between the United States and Great Britain by a tribunal at Geneva, the movement towards peaceful international legal conciliation and dispute-resolution gathered impetus, and in 1899, the Hague Convention for the Pacific Settlement of International Disputes established international facilities for the operation of a Permanent Court of Arbitration.[356] Although the Convention failed to establish a permanent organ, machinery for the peaceful resolution of conflicts was successfully manufactured in the form of *ad hoc* arbitral tribunals. Further, the Convention established an International Bureau at the Hague to serve as a secretariat, and also a Permanent Administrative Council.

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[354] See Archer, C. International Organizations (1983), pp.3-15, and also Bowett, D.W. The Law of International Institutions (Fourth edition, 1982), pp.1-12.

[355] Moore, J.B. History and Digest of International Arbitrations (1898), Vol. 1, pp.495-682.

The Second Hague Convention of 1907 strengthened the foundation for the Court, and provided for summary procedure for the swift resolution of disputes of a secondary importance.[357] However, the Court was only permanent in that a panel was continuously available for the selection of arbitrators, and that the Administrative Council and the International Bureau existed to facilitate the creation of tribunals.[358] Despite the precocious nature of this step, this institution, which remains available in contemporary international dispute resolution[359] , was the precursor to the nascence of international legal adjudication in the form of the Permanent Court of International Justice, and the

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[356] Consolidated Treaty Series, 1898-1899, Vol. 187, pp.410-428. See Hudson, M.O. International Tribunals, Past and Present (1944), pp.3-14; Foster, J. Arbitration and the Hague Court (1919), pp.3-104; and Garner, J.W. Recent Developments in International Law (1925), pp.464-525.

[357] Consolidated Treaty Series, 1907, Vol. 205, pp.233-249.

[358] Hudson, M.O. Treatise on the Permanent Court of International Justice (1934), p.11.

[359] Between 1900 and 1920, the Permanent Court of Arbitration was the primary organization for international arbitration. Between 1900 and 1932, twenty cases were heard, but since then only three more have been dealt with. According to some writers, it is possible that this institution will play a greater part in international life in the future. See Brownlie, I. Principles of Public International Law (Third edition, 1979), pp.707-708.

International Court of Justice, the former established under Article 14 of the League of Nations Covenant.[360]

Concurrent with the increase in resort to international arbitration was a proliferation of multilateral treaties and declarations which substantially augmented or codified particular areas of substantive international law. Aside from the important political conferences such as those at Paris in 1856, London in 1871, and Brussels in 1874, a procession of conventions was negotiated, culminating in the Hague Conferences of 1899 and 1907. For example, in addition to the Convention on the Pacific Settlement of Disputes, the Hague Conference of 1899 also agreed on the provisions of two further conventions, and three declarations, whilst simultaneously expressing a number of desires.[361] Supplementing the rules enacted in 1899, at the Second International Peace Conference at the Hague, held in 1907, thirteen conventions or treaties, predominantly relating to the laws and customs of war and the pacific settlement of disputes, were established.[362]

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[360] See Bowett, op. cit. pp.255-266.

[361] Consolidated Treaty Series, 1898-1899, Vol. 187, pp.429-460. A description of the origins, instruments and subject-matter discussed at this conference is given in Hull, W.I. The Two Hague Conferences and Their Contribution to International Law (1908), pp.1-448. See also Choate, J.H. The Two Hague Conferences (1913), pp.3-43.

[362] Consolidated Treaty Series, 1907, Vol. 205, pp.216-407. The various agreements and conventions agreed at these Conferences are collected in Scott, J.B. Texts of the Peace Conferences at the Hague, 1899 and 1907 (1916). For a description of the historical evolution of the rules and customs of war, see Best, G. Humanity in Warfare (1980), pp.128-215. Instruments other than those relating to the conduct of war, include, in particular, Convention II of 1907, relating to the limitation of force for the recovery

Another significant development of this era was the subtle displacement of the role of the international jurist caused by the increase in state participation in norm-creating processes. During this particular era, jurists, once considered the ultimate enunciators and depositors of legal principles, assumed the role of mere assimilators, commentators and interpreters of state practices in the scheme of international legal relations. As sovereign nations entered the chambers of international norm-creation, to adopt the paramount role through the mediums of multilateral treaties and custom, inevitably the role and influence of writers would correspondingly diminish to a subsidiary level. The time when individual treatises by "institutional" classical writers such as Grotius, Wolff and Vattel, could prescribe the nature and content of a sovereign's legal obligations had elapsed.

Further, as the weight of legal decisions increased, whether by arbitration, or later by judicial dicta, the authority of the commentator was correspondingly diminished.[363] Ultimately the role of the international jurist would be as ordained in the statute of the International Court of Justice, Article 38 of which prescribes:

"The Court, whose function is to decide in

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[362] (cont'd) of contractual debts, and Convention XII, also of 1907, which relates to the creation of an international prize court.

[363] Parry, C. The Sources and Evidences of International Law (1965), pp.103-104. See also Hoof, G.J.H. van Rethinking the Sources of International Law (1983), pp.176-178.

> accordance with international law such disputes as are submitted to it, shall apply...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[364]

However, in practice, in the jurisprudence of the Court, and in the actual teaching of international law itself, the influence of the jurist remains substantial.[365] Despite infrequent references by the Court to legal writers, evidence of their subtle influence can be gleaned from certain passages in dicta, and occasionally in Separate or Dissenting Opinions from International Justices.[366]

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[364] Emphasis added. This process was also evident in the dicta of national courts. For example, in the case of The Scotia, 1871, U.S. Supreme Court, 14 Wallace, p.170, the American court interpreted a number of state acts - both legislative and judicial - in its determination of a principle of international law, in contrast to its statements on the authority of international commentators. Further, in West Rand Central Gold Mining Co. v The King [1905] 2 K.B. p.391, Lord Alverstone, C.J. stated: "The reference which these writers not infrequently make to stipulations in particular treaties as acceptible evidence of international law is as little convincing as the attempt...to establish a trade custom which is binding without being stated, by adducing evidence of express stipulations to be found in a number of particular contracts.

[365] For an analysis of the influence of teachings upon the identification and application of international law, see Lachs, M. The Teacher in International Law (1982), especially pp.167-100, and Cheng, B. International Law: Teaching and Practice (1982). See also Carty, A. The Decay of International Law ? (1986), pp.13-23.

[366] See for example, the Individual Opinion of Judge Hudson in The Diversion of Waters From Meuse Case (Netherlands v Belgium) P.C.I.J. Reports (1937), Series A/B No. 70, at p.76. See also Lauterpacht, H. International Law, Collected Papers (1970), Vol. 1, pp.249-256 and Lauterpacht, H. The Development of International Law by the International Court

Commentators still provide a coherent, comprehensive, and generally impartial account of the state of international law in the period of their writings. This tertiary role is not insignificant, and the value of certain works in the latter part of the nineteenth century and into the twentieth century, cannot be disputed despite this displacement.[367] While the accretion of state participation continued, and positivist doctrines proliferated in international literature, several writers from this era, such as Hall, Lawrence, Westlake, Hyde, Moore, and Oppenheim, wrote significant expositions of substantive law. However, evident in all these works was the all-pervasive influence and effects of state practice.

The legal principle of non-intervention, as derived in the earlier works of international jurists, continued to be universally asserted by politicians, lawyers, diplomats, and political theoreticians of this era as the proper standard of international co-existence.[368] By the latter half of the nineteenth century, the non-intervention norm had coalesced into the form in which it exists in contemporary international jurisprudence. However, in the synthesis of the various works from this era, substantial disagreement

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[366](cont'd) (1958), pp.23-25.

[367] For an illustration of the writings of jurists as evidence of international custom, see The Paquete Habana, 1900, U.S. Supreme Court, 175 U.S.R. p.677. See also Brownlie, I. Principles of International Law (Third edition, 1979), pp.25-26.

[368] See Vincent, R.J. Non-Intervention and International Order (1973), pp.45-63, which gives a discourse of the political theoretical developments of that era.

existed concerning the nature and ambit of the principle. However, notwithstanding the difference of opinion upon the variety and extent of the exceptions to the rule, unanimous consent existed supporting the duty of states to refrain from unjustified interference into sovereign domestic jurisdiction and the continuance of the observation of those rights fundamental to sovereignty.

B. THE DOCTRINAL CONCEPTION OF INTERVENTION.

One of the most influential writers of this period was the British jurist Hall, whose work was first published in 1880, and appeared in eight subsequent editions. Throughout the evolution of this work, the consideration given to the principle of non-intervention remained fundamentally unaltered. In his treatment of this subject matter, Hall was naturally innately influenced by his predecessors, since much of his propositions and statements upon this principle had appeared in earlier works.[369] This supports the argument that his treatment suitably depicted substantive legal opinion at this period. Indeed this author's description of the principle typified the development and absolute adoption of the principle in international law, although its essential nature and extent remained as ambiguous as it appears in its contemporary form.

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[369] For example, compare with Bernard, M. On the Principle of Non-Intervention (1860), pp.1-10, and Creasy, Sir E.S. First Platform of International Law (1876), Para. 295, p.287.

The ultimate foundation of international law was conceived in the assumption that "states possess rights and are subject to duties corresponding to the facts of their postulated nature."[370] One such fundamental right was to an independent existence which was expressed in the following passage:

> "A state has a right to live its life in its own way, so long as it keeps rigidly to itself, and refrains from interfering with the equal right of other states to live their life in a manner which commends itself to them, either by its own action, or by lending the shelter of its independence to persons organising armed attack upon the political or social order elsewhere established."[371]

After having acknowledged the existence of an international right to independence[372] , which automatically implied a prohibition upon nations interfering in the domestic affairs of a state, he then defined his perception of the term "intervention". In this definition Hall drew the essential elements of this concept from the works of his predecessors, to mold them into a coherent formulation which would be quite influencial upon a number of his successors.

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[370] Hall, W.E. A Treatise on International Law (First edition, 1880), Part I, Chapter II, Para. 7. Note that the same system of reference was employed throughout all editions of this work, including the eighth and final edition.

[371] Hall, ibid, Part I, Chapter II, Para. 8.

[372] Hall, ibid, Part I, Chapter II, Para. 10. Note the similarity between this passage and the subsequent dicta of Umpire Huber in the Island of Palmas Arbitration (1928) 2 R.I.A.A. p.829, at p.838.

He believed:

> "Intervention takes place when a state interferes in the relations of two other states without the consent of both or either of them, or when it interferes in the domestic affairs of another state irrespective of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it. *Prima facie* intervention is a hostile act because it constitutes an attack upon the independence of the state subjected to it."[373]

When a nation embarked upon a course of action circumscribed within this definition, then a charge of intervention could be leveled. *Ex facie*, such an act was illegitimate unless certain criteria could be adduced as proof of certain justifying circumstances.

He then proceeded to stipulate the obligation that, since all nations being legally required to adhere to the rule of non-intervention, then "the legality of an intervention must depend on the power of an intervening state to show that its action is sanctioned by some principle which can, and in the particular case does, take precedence of [the duty of non-intervention]"[374] A presumption of illegality was therefore imposed against a nation acting in a manner characterized as intervention. Further, the burden of proof compelled a state to justify its actions to the world community.

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[373] Hall, ibid, Part II, Chapter VIII, Para. 88.
[374] Hall, ibid, Part II, Chapter VIII, Para. 89.

The special feature of this description of the principle, which differed from earlier dipictions, was that it isolated the nature of the act of intervention itself, as a physical act which necessarily involved coercion. From subsequent passages in his work, it was also evident that intervention was perceived as delictual conduct which circumvents the independent will of a nation, invariably involving threatened or actual physical force. Further, since intervention was also feasible against the internal or external dimension of a nation's sovereignty, this was an implied recognition of the dual nature of sovereignty.[375]

Significantly, a number of influential jurists from this period adopted similar prescriptions in their attempts to describe the nature of intervention. For example, Moore, in his Digest of International Law, quoted verbatim the above definition by Hall as authority for the definition of intervention.[376] Similarly, another equally influential figure in North American international jurisprudence, stated:

> "The term intervention is here used to describe simply the interference by a State in the domestic or foreign affairs of another in opposition to its will and serving by design or implication to impair its political independence."[377]

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[375] Hall, ibid, Part I, Chapter II, Para. 10.
[376] Moore, J.B. A Digest of International Law (1906), Vol. VI, Chapter XIX, Para. 897, at p.2.
[377] Hyde, C.C. International Law (First edition, 1922), Vol.

Although perhaps plausibly a broader definition than that elaborated by Hall, since it omitted to specify the necessary causal connection between the act and the alleged coerced actions of the intervened state, Hyde thereafter proceeded to cite Hall's definition of the term, as stated in the seventh edition, as authority for the proposition.[378]

The opinions of British jurists of the early twentieth century also corroborate this statement. Winfield, on several occasions wrote upon the nature of the non-intervention norm, and, in his treatment of the concept, he concurred with Hall's thesis on this subject, citing that author as the definitive elaborator of the nature and authority for the principle.[379] Further, Oppenheim, possibly the most authoritative writer of the early twentieth century, was unquestionably influenced by the rationales espoused by Hall when he wrote:

> "Intervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things...Intervention can take place in the external as well as the internal affairs of a State...But it must be emphasized that intervention proper is always dictatorial interference, not interference

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[377](cont'd) 1, Part II, Title A, Para. 69, p.117.
[378] Hyde, ibid, Vol. 1, Part II, Title A, Para. 69, p.117, at note 2.
[379] Winfield, P.H. "The History of Intervention in International Law", 1922 (III) B.Y.I.L. p.130, at pp.130-131.

pure and simple."[380]

A survey of the prominent jurists of this period reveals a considerable degree of consensus upon the essential attributes of intervention. Lawrence, originally writing in 1895, contemplated the nature of non-intervention and concluded that intervention represented an encroachment upon the internal or external affairs of a sovereign nation, which resulted in the subjugation of the will of that nation.[381] He substantiated this proposition by providing that "the essence of intervention is force, or the threat of force, in case the dictates of the intervening power are disregarded."[382] Also in agreement with Hall, he continued:

> "In every case of [intervention] the burden of proving justification rests upon the intervening power; for it is in its very nature an infringement of the independence of the state subjected to it, and therefore a violation of an acknowledged principle of International Law."[383]

Consequently, by the turn of the nineteenth century, a well established principle existed that a manifestation of intervention was, *ex facie*, an illegal act which required a state to justify its actions by reference to circumstances legally justifying the action.[384]

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[380] Oppenheim, L. International Law (First edition, 1905), Vol. I, Para. 134, pp.181-182. Emphasis added.

[381] Lawrence, T.J. Principles of International Law (First edition, 1895), Part II, Chapter I, Para. 74, pp.115-116. (Seventh edition, edited by P.H. Winfield, 1923, Part II, Chapter I, Para. 62.)

[382] Lawrence, ibid, Part II, Chapter I, Para. 74, p.117. (Seventh edition, Part II, Chapter I, Para. 62.)

[383] Lawrence, ibid, Part II, Chapter I, Para. 74, p.115. Note that the corresponding passage in the seventh edition, at Part II, Chapter I, Para. 62, Winfield omitted this passage.

General, if not universal, acceptance existed that the cardinal rule of state conduct was non-intervention, and that acts of intervention constituted deviant behaviour. However, notwithstanding the harmony which regarded intervention as the illegitimate employment of physical force to circumvent the independent self-government of a nation, uncertainty persisted relating to the degree and manner of compulsion necessary to warrant a charge of intervention.[385] The adoption of military force against the territorial integrity or the political independence of a sovereign state was universally acknowledged as intervention.

Confusion did exist as to whether lesser manifestations of force qualified as illegal intervention. In particular, it was unclear whether diplomatic interference or economic coercion could qualify as intervention. For example, Stapleton believed that the actual employment of physical force was essential to constitute an act of intervention. In this context he stated:

> "(B)y leaving out the word FORCIBLE, and by then applying [the term intervention], without limitation or explanation, much confusion respecting it has

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[384] See Davis, G.B. The Elements of International Law (1908), at pp.98-99.

[385] See Stowell, E.C. Intervention in International Law (1921), pp.317-322.

> arisen. It is essential, therefore, that it should be correctly defined; for, taking it in the broad sense in which it is sometimes taken, as forbidding all kinds of intervention in the internal affairs of neighbouring states, it is neither defensible in theory nor harmless in practice."[386]

For Stapleton, force was the *sine qua non* of intervention. Supporting Stapleton, Westlake believed that:

> "(T)he tender of advice to a foreign government, even about the internal affairs of its state, is not intervention and violates no right, though it is generally injudicious..."[387]

In contrast, the Russian jurist De Martens stated:

> "Intervention takes place by means of diplomatic notes or by force of arms."[388]

Further confusion was supplied by De Floeckher who prescribed:

> "Intervention exists from the moment that notice of the demand is given to the state upon which it is made, and it is not necessary that it be enforced for the state often yields to the pressure brought to bear upon it."[389]

Consequently, the degree of coercion necessary, and its causal effect, were both elements of uncertainty in the description of this principle at this period. However, the majority of authorities appeared to have been prepared to accept that the employment of military force was invariably intervention, this being the only common denominator ascertainable from an examination of these texts.

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[386] Stapleton, A.G. Intervention and Non-Intervention (1866), at p.6.
[387] Westlake, J. International Law (1904), Vol. 1, p.308.
[388] Martens, F. de. Traite de Droit International (1883), Vol. 1, p.299. Translated in Stowell, op. cit. at p.320.
[389] Flockher, A. von, De L'Intervention en Droit International (1896), p.4. Translated in Stowell, op. cit. at p.320.

Consensus also existed in a substantial number of works of this period, either expressly or implicitly, that a nation acting in an interventionary fashion had to justify its action in terms of the formulae and procedures provided in international law, to the world community.

Equally conclusive was the common belief that the principle of non-intervention was not absolute.[390] In this sense, any survey of legal authorities would necessarily disclose the existence of a number of causes which a nation could invoke to justify intervention. Acts of intervention were averred to be legitimate to support, *inter alia*, the balance of power, to fulfil obligations of friendship, to protect reversionary rights, to repress civil war and anarchy, to prevent widespread violations of fundamental human rights, to protect nationals or fraternal religious groups, to preserve the peace of a nation, and for self-defence.[391] Whilst certain of these grounds adduced were no more than the idiosyncratic manifestations of individual jurists, equally a number of grounds undeniably existed to legitimise intervention in the view of international law. Prior to the outbreak of hostilities in 1914, the following grounds for intervention were commonly accepted as legitimate: intervention for self-preservation, for self-defence, to remedy certain forms of delictual conduct, and under the provisions of an appropriate treaty.

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[390] The closest approximation to a principle of absolute non-intervention, from the perspective of international law as opposed to from political deduction, was undertaken by Fiore, P. in International Law Codified (Fifth edition, translated by E.M. Borchard, 1918), who, at Para. 548, p.265, stated:

> "Each State is bound not to interfere in the affairs of other States, with a view to obstructing or preventing the free and independent exercise of their rights of sovereignty and the free development of all the functions and legitimate activities of government...Intervention must be considered absolutely unlawful."

However, this jurist was prepared to conceed the existence of certain collective rights of the international community. See also Bernard, op. cit. p.12. This latter author was forced to concede that intervention was justified for the purposes of self-defence. The International Court of Justice, in post-1945 jurisprudence, has tended towards this latter interpretation of the principle. In the Corfu Channel (Merits) Case, I.C.J. Reports (1949), p.35, the Court stated:

> "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law."

C. INTERVENTION FOR SELF-PRESERVATION AND SELF-DEFENCE.

Amongst all the writers of this period, the concept of self-preservation was considered the fundamental right of all nations, and the *sine qua non* of sovereignty. However substantial confusion existed in defining the implications

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[390] (cont'd)

[391] For a comprehensive analysis of the purported grounds for intervention, see Winfield, P.H. "The Grounds of Intervention in International Law", 1924 (V) B.Y.I.L. pp.149-162, at p.150.

and repercussions of this right. Self-preservation for our purposes, must be distinguished from self-defence, since the former was a more extensive right.[392]

Although self-defence was occasionally treated as a subsection of self-preservation, in the writings of this period, the latter right entailed substantial connotations which merit an extensive and individual examination.[393]

In this respect, self-preservation would extend to intervention for the purpose of removing elements which have a detrimental effect upon the peace and security of the intervening state, regardless of the fault or culpability of the state intervened.[394]

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[392] The distinction and relationship between self-preservation and self-defence is well documented in the following:Twiss, T. The Law of Nations (Second edition, 1884), Paras 106-110, pp.178-185; Schwarzenberger, G. International Law (1968), Vol. II, pp.30-31; and Brierly, J.L. The Law of Nations (Sixth edition, by Waldock, 1963), p.404, where this author, referring to pleas of self-preservation, stated:

> "Such a doctrine would destroy the imperative character of any system of law in which it were applied, for it makes all obligation to obey the law merely conditional; and there is hardly any act of international lawlessness which it might not be claimed to excuse."

[393] Commenting on self-preservation in the modern sense, Bowett, in his work Self-Defence in International Law(1958), at p.10, states:

> "It is doubtful whether self-preservation can have any meaning as a legal concept apart from a generic term for self-defence, self-help and necessity; its appeal lies in the realm of ideology rather than of law. In so far as self-preservation and necessity find a use as concepts justifying conduct which, though not lawful (and therefore distinct from self-defence) is yet excusable, their scope is limited."

[394] An analysis and contrast of self-defence with self-preservation was presented by Schwarzenberger, G. "The Fundamental Principles of International Law", 1955 Hague Recueil Vol. 87, pp.195-387, at pp.327-346.

A widespread belief among jurists of this era was that international law was subject to the right, and even in some cases the duty, of self-preservation. According to this doctrine, a state was at liberty to adopt measures to circumvent actions which had a detrimental effect, directly or indirectly, upon the peaceful existence of the state.[395] In the writings of this period, it was generally accepted that to claim that the non-intervention norm prevailed over the right of self-preservation would be to deny international reality and legal practicality. Hall, for example, conceded that all duties imposed upon a state by international law were subordinated to the right of self-preservation.[396] Since this was a fundamental rule of law, intervention would be legitimate when adopted in conformity with the right of self-preservation. Therefore, he specifically provided:

"Interventions for the purpose of self-preservation

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[395] Support for this proposition existed in state practice in the form of the statement made by Canning relating to the continued practices of the Holy Alliance. In this matter, the British Foreign Secretary stated:

> "[If] a nation attempts to propagate first her principles, and afterwards her dominion by the sword, or encourages the subjects of another to resist authority, or assists rebellious subjects, then it stands to reason that a hostile attitude on the part of a state so injured is lawful, but also that such hostile attitude, even though carried to the extent of interfering in the internal affairs of the assailant, and making forcible changes in her government, is not an act of intervention, but a justifiable act of war: for every circumstance that gives a state a just cause for war gives it at the same time a just cause of intervention."

Annual Register, Vol. 65, p.141. See also Winfield, loc. cit. at pp.151-154.

[396] Hall, op. cit. Part II, Chapter VII, Paras 83 and 85.

> naturally include all those which are grounded upon danger to the institutions, to the good order, or to the external safety of the intervening state...If a government is too weak to prevent actual attacks upon a neighbour by its subjects, if it foments revolution abroad, or if it threatens hostilities which may be averted by its overthrow, a menaced state may adopt such measures as are necessary to obtain substantial guarantees for its own security."[397]

This extremely extensive interpretation of the right to self-preservation would necessarily included situations where the victim was not at fault, other than being inept, unable to control its population, or unable to effectively secure its frontiers.[398] Further, the inherent vagueness of this prescription provided an extensive discretion to a nation to intervene upon the most nefarious of pretexts. However, Hall was adamant that, such a nation failed in its international responsibilities, and that a state was entitled to intervene to enforce these duties.[399]

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[397] Hall, op. cit. Part II, Chapter VII, Para. 91.

[398] Stowell, op. cit. pp.392-414.

[399] A degree of support in state practice for the defence of self-preservation can be derived from the case of the "Amelia Island". This island, which is situated at the mouth of the St. Mary's River, and which was a Spanish possession, was seized by a group of pirates who, in the name of the insurgent colonies of Buenos Aires and Venezuela, preyed on Spanish and American commerce. Since the Spanish government had shown itself unwilling to take action, U.S. President Monroe directed that an American vessel of war should be dispatched to expelled the marauders. In this action, these forces were sucessful. In response to Spanish protests over the action, U.S. Secretary of State, Adams, stated:

Similarly extensive interpretations of the principle of self-preservation had earlier emanated from both Wheaton and Phillimore[400] , the latter of whom stated:

> "No State has a right to establish a form of government which is built upon professed principles of hostility to the governments of other nations."[401]

Westlake supported this approach and consided that, in a situation of anarchy or misrule in a nation, where the effects of which disturb the peace and tranquillity of a neighbouring nation, then the latter was entitled to intervene to interdict such actions.[402]

Opposition to these extensive assertions of discretion was attempted by both Bernard and Mamiani. Bernard, although supporting, in principle, intervention for self-defence, denied the right of a nation to interfere in the internal affairs of another nation merely on the broad and vague pretext of self-preservation or necessity. Thus Bernard, writing in 1860, stated:

> "Interference in the internal affairs of a Foreign

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[399] (cont'd)

"When an island is occupied by a nest of pirates, harassing the commerce of the United States, they must be pursued and driven from it, by the authority of the United States, even though such islands were nominally under the jurisdiction of Spain, Spain not exercising over it any control."

Moore, J.B. Digest of International Law (1906), Vol. II, Para. 216, pp.406-408.

[400] See text above, pp.79-80,84.

[401] Phillimore, R. Commentaries Upon International Law (1854), Vol. 1, Part VI, Chapter 1, Para. 435, p.315.

[402] Westlake, op. cit. Vol. 1, p.305.

> State never can be a necessity, unless it is a self-made necessity. As long as what is passing in your neighbour's house does not directly concern you, there cannot be that pressing call for self-defence, that clear, formidable, imminent danger, which the plea assumes."[403]

Support for this argument was also derived from Mamiani who believed that the principle of non-intervention prevailed over the right of self-preservation. Thus, for him "no grandeur of purpose, not even any necessity or extreme pressure of an emergency, [could] suffice to justify the resort to means which are not good."[404]

However, despite these protestations, the overwhelming proportion of international jurists at this period supported intervention for self-preservation, whether under the guise of necessity or the protection of vital interests, and most in a similar fashion as that adopted by Hall.[405]

A complementary ground for intervention proposed at this period was for reasons of self-defence. In the context of intervention, the main rationale for the assertion of intervention under the motive of self-defence was to prevent actions by neighbouring states to assist or foment internal conflict.[406] This differed from self-preservation and necessity because it was restricted to more specific circumstances, although a substantial number of writers incorporated self-defence under the nomenclature of self-preservation.[407] Similarly, a number of writers permitted intervention in self-defence but denied this right for self-preservation.[408]

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[403] Bernard, op. cit. at p.12

[404] Mamiani, Count. The Rights of Nations (Translated by R. Action, 1860), p.192. See also Fiore, op. cit. Para. 551, p.266 who stated that:

> "[I]mmediate injury and the detriment to national interests and prospects, which may indirectly result from a revolution within a foreign state and from civil war, do not justify armed intervention".

[405] See also Oppenheim, First edition, op. cit. Vol. I, Part I, Chapter II, Section VI, Para. 136, at p.185.

Self-defence as a motive for intervention was not distinguished from self-defence against an aggressor, and therefore the customary rules of this period respecting self-defence against the unlawful use of force were equally applicable for the purposes of intervention.[409] Consequently, the circumstances which justified intervention in self-defence had to amount to the existence of a "...necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[410] Intervention motivated by reasons of self-defence differed from similar action in self-preservation in the sense than the former was restricted to the adoption of force against aggression aimed against the territorial integrity of a nation, as opposed to extending to counter factors which, although having an indirect effect on the domestic administration and concerns of a nation, were nonetheless not emanating from aggression.[411]

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[406] See Smith, F.E. International Law (Fourth edition, edited by J.Wylie, 1911), pp.54-58.

[407] This is discussed in Brownlie, I. International Law and the Use of Force by States (1963), pp.40-44. See also Winfield, loc. cit. at pp.151-152.

[408] For example, Oppenheim, in his first edition, Vol. I, Para. 133, pp.180-182, discussed the case of the Caroline under the rubric of self-preservation. It was widely accepted at this time that the statement made by U.S. Secretary Webster represented the necesary conditions for the legitimate exercise of self-defence.

[409] See Twiss, T. The Law of Nations (1884), Paras 107-110, pp.178-185, and Walker, T.A. A Manual of Public International Law (1895), Para. 32, pp.86-92. In the modern context, see Bowett, D.W. Self-Defence in International Law (1958), pp.117-132.

[410] Caroline Incident, note of August 6, 1842, from Mr. Webster to Lord Ashburton in connection with the action of British colonists, British and Foreign State Papers, Vol. XXX, p.193. The test established in the Caroline Case was

Stronger and more cohesive support for the principle of self-defence decidely existed at this time than for the application of the concept of self-preservation. Lawrence

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[410](cont'd) subsequently applied to the case of the "Virginius", in 1873, when the British Foreign Secretary, Lord Granville, stated, in respect of the Spanish capture of a British ship supplying arms to the rebels in Cuba:

> "Much may be excused in acts done under the expectation of instant damage in self-defence by a nation, as well as by an individual. But after the capture of the "Virginius" and the detention of the crew was effected, no pretence of imminent necessity of self-defence could be alleged."

Taken from Walker, T.A. A Manual of Public International Law (1895), pp.91-92. See also Moore, Digest, op. cit. Vol. II, Para. 309, pp.895-903.

[411] The outline of the facts of this case is given in Jennings, R.Y. "The Caroline and McLeod Cases", 1938 (32) A.J.I.L. pp.82-99. In discussing self-preservation relative to self-defence, this author stated:

> "The Caroline was the first important case of intervention in self-defence where the intervention was suffered by a strong state. Consequently, the intervening states was not allowed to plead self-defence as a mere shibboleth. Some attempt was made to define the limits of self-defence and to examine its legal content. Most important of all, the conception was rescued from the Naturalist notions of a absolute primordial right of self-preservation, which still vitiated the doctrine of writers, and was subjected to the limiting condition of necessity; and necessity as nowhere more carefully defined than in Webster's letter to Fox."

exemplified the interaction of the customary rules of self-defence with the legitimate exercise of intervention when he stated that "(i)ntervention to ward off imminent danger to the intervening power is justified"[412], but continued:

> "(T)he danger must be direct and immediate, not contingent and remote, and, moreover, it must be sufficiently important in itself to justify the expenditure of blood and treasure in order to repel it...Further, the cause which justifies intervention must be important enough to justify war."[413]

Westlake also fully endorsed this proposition, thereby corroborating the legality of intervention for the purpose of self-defence.[414]

This conception of self-defence was not limited to direct attacks upon the territorial integrity of the intervening states, but was also extended to the protection of nationals abroad. The right of a state to intervene by the use or threat of force for the security of its nationals was generally admitted as a measure of self-defence in both the writings of jurists and the practice of states.[415] In the arbitration between Great Britain and Spain in 1925, one of the series known as the Spanish Moroccan Claims, Judge Huber, as rapporteur of the Commission, stated:

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[412] Lawrence, op. cit. Part II, Chapter I, Para. 76, p.118. In the seventh and final edition of this work, Winfield decided to classifly intervention for the purpose of self-defence under the general heading of interventions for the purposes of self-preservation, at Part II, Chapter I, Para. 65.

[413] Lawrence, op. cit. Part II, Chapter I, Para. 76, p.118. (Seventh edition, Part II, Chapter I, Para. 65)

[414] Westlake, op. cit. Vol. 1, p.305. See also Walker, op. cit. pp.23-25.

[415] Oppenheim, L. International Law (First edition, 1905), Vol. I, Paras 135, 319, at pp.185, 374-375. At p.185 this

> "(I)t cannot be denied that at a certain point, the interests of a State in exercising protection over its nationals and their property can take precedence over territorial sovereignty, despite the absence of any conventional provisions. This right of intervention has been claimed by all states; only its limits are disputed."[416]

Other than upon self-defence, this ground of intervention was also justified upon the rationale that, since the territory of a sovereign state was inviolable, then each individual sovereign was conferred with the power and capacity, as well as the responsibility, to exercise control and maintain order throughout the national

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[415](cont'd) author stated:

> "The right of protection over citizens abroad, which a state holds, may cause an intervention by right to which the other party is legally bound to submit. [And it matters not whether protection of the life, security, honour or property of a citizen abroad is concerned.]" Brackets indicate the additions made by Lauterpacht in the eighth edition.

See generally Borchard, E.M. Diplomatic Protection of Citizens Abroad (1916); Stowell, E.C. & Monroe, H.F. International Cases (1916), pp.298-311; and Moore, J.B. Principles of American Diplomacy (1902), p.131 of which provided:

> "The right of the government to intervene for the protection of its citizens in foreign lands was never doubted."

See also Chibambo, T.N. Unilateral Use of Force in the Protection of Nationals Abroad and Present International Law (1981), pp.1-21.

[416] Anglo-Spanish Arbitrations, Beni-Madan, Rzini Claim (1925) 2 R.I.A.A. p.616. As translated in Bowett, D.W. Self-Defence in International Law (1958), pp.87-88.

territorial domain.[417] When, therefore, within the territory of a foreign state, nationals of another country were unlawfully injured, or their safety compromised by the neglect or unwillinness of that sovereign to perform its duties and afford adequate protection, then the entrance of foreign forces, of the nationality of those whose rights were so impaired, was to be anticipated.[418]

The justification for the action was inherent in the fact that it served to ensure the performance of these obligations towards aliens, since the continued dereliction of these duties would result in substantial injury to persons entitled under international law to protection. As a result, it was this absence of efficient and responsible government that removed any possible legal ground of objection to such action.

D. COUNTER-INTERVENTION.

A third cause upon which substantial consensus existed legitimating intervention was in situations when counter-interventionary measures were adopted to redress prior illegal interventions on the part of another state.[419] Support for this assertion emanated from the proposition that, since a nation was at liberty to counter-intervene on its own behalf under the principle of self-defence, then it was equally at liberty to defend the threatened integrity of a friendly neighbour or ally.[420] Hall believed that an incontestable delict was committed when a nation violated the sovereignty of another without legal justification, and that it was "consequently evident that another state is at liberty to intervene in order to undo the effects of illegal intervention and to restore the state subjected to it to freedom of action."[421] As a result, when the intervention was undertaken for the sole objective of liberating an illegally subverted nation, this action was deemed to be legitimate.[422]

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[417] See Hodges, H.G. The Doctrine of Intervention (1915), pp.58-65.
[418] Hyde, C.C. "Intervention in Theory and in Practice", 1911-1912 (6) Illinois Law Review, pp.1-16, at pp.4-5.
[419] See Stowell, op. cit. pp.45-51.

Support for this sentiment was near universal.[423] After extensive consideration of the nature of the concept of intervention, Mamani concluded that the most laudable form of intervention was in support of a subverted ally.[424] Lawrence derived the authority for such intervention from the right of a nation to defend itself against aggression, and the extension of this principle to the participants in an alliance.[425] Oppenheim, however, was prepared to take this principle further, and asserted that:

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[420] Westlake, op. cit. Vol. 1, p.307.
[421] Hall, op. cit. Part II, Chapter VIII, Para. 92.
[422] Hershey, op. cit. p.150, claimed that intervention was legally permissible "to prevent or terminate an illegal intervention on the part of another State, as in the case of the United States against the French in Mexico in 1865."
[423] See also Creasy, op. cit. at p.303 who stated that intervention was legitimate "where some other foreign power has intervened already, so that our purpose is not to introduce but to check intervention".
[424] Mamiani, op. cit. at p.197.
[425] Lawrence, op. cit. Part II, Chapter I, Para. 78, at p.119. Note that, in the final edition of this work Winfield completely ommitted consideration of this motive for intervention.

> "(I)f a State in time of peace or war violates those principles of the Law of Nations which are universally recognised, other States have a right to intervene and to make the delinquent submit to the respective principles."[426]

According to Oppenheim, intervention was therefore permissible as a remedy to certain forms of international delicts.[427]

Although, this latter statement of purported law was somewhat vague as a rule of law and would permit intervention upon the most flimsy of pretexts, since no reference was made to proportionality, support for this proposition did exist, to a certain degree, in state practice. For example, in the interventions of the European powers in the affairs of South American states, it was assumed that interference was legitimate for the purposes of debt-collection, or as an international remedy to certain forms of delictual conduct.[428] Although a double standard definitely existed in this treatment, since interventions on such grounds were never conducted between the European states themselves, the degree of practice and the attempts to limit such interventions by conventional means[429], support the credibility of such a statement. As a direct result, it is not an unjustifiable conclusion to say that, in this respect, the rule of non-intervention could be manipulated in favour of the dictates of those states powerful enough to profit from international strife and discord.

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[426] Oppenheim, First edition, op. cit. Vol. I, Para. 135, at p.184.

[427] Hall corroberrated this proposition by stating:
> "When a State grossly and patently violates international law in a matter of serious importance, it is competent to any State, or to the body of States, to hinder the wrongdoing from being accomplished, or to punish the wrongdoer..."

Hall, op. cit. Part I, Chapter II, Para. 12.

[428] See text below, pp.241-258.

E. INTERNATIONAL CONTRACTUAL OBLIGATIONS.

The final ground upon which cohesive doctrinal opinion appears to exist relates to intervention undertaken under the provisions of an appropriate agreement. In this context, intervention must be divided into the internal and external dimensions of sovereignty. Certain treaties established rights guaranteeing the succession of a particular form of government, and establishing rights of intervention for this purpose, which mainly concerned issues of internal sovereignty. Similar obligations could also be established for the purposes of minority protection within a state, creating rights of petition and representation which could, in themselves, ultimately lead to intervention.[430] A second

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[429] See text below, pp.268-270.

[430] In this respect, see Lauterpacht, H. International Law and Human Rights (1950), pp.120-122, especially p.121, where this author stated:

> "International law has contributed in a...direct way to the maintenance of the rights of man...by the practice, which began in the middle of the seventeenth century, of safeguarding through treaties the rights of religious freedom; by the long series of treaties of a humanitarian character ranging from slavery conventions to the imposing structure of conventions concluded under the aegis

form of agreement related to the right to intervene in the relations of two or more states when provisions had been made for the amalgamation or union of two distinct nations upon the occurrence of certain events, thereby creating rights of succession to the complete order. Such an agreements would concern the external aspects of sovereignty.

The legality of internal intervention in these proposed circumstances was probably conclusively proven in the preponderance of authorities supporting the principle.[431] However adverse dissent against such an opinion is not difficult to find, and both Halleck and Bernard vigorously denied that a treaty could create rights of intervention for the purposes of perpetuating a particular government or regime, whilst Hall also prohibited intervention under such a guarantee.[432] However, in support of such a right, Lawrence stated:

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[430] (cont'd) of the International Labour Organization; [and] by the Minorities Treaties entered into after the First World War."
On the history of state practice, see Ganji, M. International Protection of Human Rights (1962), pp.17-22.

[431] In commenting upon the development of this form of intervention, Winfield suggested that, although such agreements could not be concluded once a conflict inside a nation has escalated to belligerency, treaties conferring rights of intervention could be created during times of peace. Once an internal problem arose, then the intervening state could treat these events as a *casus interventionis*, and resort to the measures contemplated within the terms of the agreement. See Winfield, P.H. "The Grounds of Intervention in International Law", 1924 (V) B.Y.I.L. pp.149-162, at pp.155-158.

[432] Halleck, H.W. International Law (1861), Chapter IV, Para. 8, p.86; Bernard, op. cit. p.14; and Hall, op. cit. Part II, Chapter VIII, Paras 91 and 93.

> "States constantly enter into agreements which modify their rights and duties as defined by International Law; and we cannot say that treaty stipulations of any kind are forbidden by it...We must therefore, lay down the further rule that Intervention in pursuance of a right to intervene given by a treaty is technically justifiable."[433]

Oppenheim concurred with this opinion and stated:

> "The question is disputed whether a State that has guaranteed by treaty the form of a government of a State or the reign of a certain dynasty over the same has a right to intervene in case of change of form of government or of dynasty. In strict law this question is, I think, to be answered in the affirmative, provided the respective treaty of guaranty [sic] was concluded between the respective States, and not between their monarchs."[434]

This right was derived from the authority of states to restrict their sovereignty by treaties, and the similar right of states to enforce their treaty rights.[435]

The theme that a sovereign state could legally curtail its powers by treaty was equally applicable to interference in the external sovereign rights of a nation, and this right was also widely accepted. Hall stated at the outset of his consideration of the subject:

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[433] Lawrence, op. cit. Part II, Chapter I, Para. 77, p.118 (Seventh edition, Part II, Chapter I, Para. 64.)

[434] Oppenheim, First edition, op. cit. Vol. I, Para. 135, p.184.

[435] Oppenheim, First edition, op. cit. Vol. I, Para. 135, p.183.

> "Unquestionably, in the abstract, if provision is made by treaty for the union of one state with another upon the occurrence of certain contingencies, the state to which the right of succession belongs is justified in taking whatever measures may be necessary to protect its reversionary rights. A state may of course contract itself out of its common law rights."[436]

In his acceptance of the right to intervene to protect conferred reversionary rights, such as would accrue under the contemplation of a union of two nations, Hall concurred that a nation was endowed with capacity to curtail or restrict its sovereignty by compact. However, he repudiated intervention to guarantee the succession of an incumbent regime, and further failed to justify this separate treatment. This positive assertion of a right to intervention stands in contrast to his subsequent statement of the rationale behind his refusal to accept intervention to guarantee the continued existence of an incumbent government.

Opposition to intervention under the provisions of a treaty was manifested by two distinct arguments. Firstly, certain authors believed that a treaty guaranteeing the succession of a regime was *ultra vires* of the powers of a sovereign.[437] Secondly, opinion existed asserting that, since non-intervention was a fundamental tenet of international law, derived from the principle of sovereignty, then a treaty conferring a right to intervene conflicted with the law, and therefore was void *ab initio*.[438] The essence of this line of reasoning suggests that sovereignty was perceived as an early form of *jus cogens*.[439] The converse of these arguments was the contention that a sovereign state was at liberty to alienate any portion of its sovereignty, and invest such rights in another nation, as perceived by that state to be fit.

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[436] Hall, op. cit, Part II, Chapter VIII, Para. 91. In referring to "common law" rights, Hall appeared to be alluding to the obligations imposed upon a state under international law, ie. the customary rights of all states to equality, independence, and the protection of the principle of non-intervention.

The practical resolution of this particular controversy can be seen from state practice, and latterly from the jurisprudence of the Permanent Court of International Justice. Numerous instances of treaties conferring rights to intervene in the internal sovereignty of a nation existed, both for the purpose of supporting an incumbent regime, or for the maintenance of internal harmony or order. The Treaty of Unkier Skelessi of 1833 created rights of representation and intervention for Russia between the Turkish Porte and

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[437] For example, see Bernard, op. cit. at p.14.

[438] For example, see Fiore, op. cit. Paras 553-554, pp.266-267.

[439] However, sovereignty cannot be considered to fall within such a category even today. See Brownlie, I. Principles of International Law (Third edition, 1979), pp.512-515, where this author agrees with the limited forms of *jus cogens* elaborated by the International Court of Justice in the Barcelona Traction Case (Second Phase), I.C.J. Reports (1970), p.3, at p.32.

Mehemet Ali for Egypt.[440] Articles 61 and 62 of the Treaty of Berlin, 1878, also provided for contingent rights of intervention.[441]

However the archetypal illustration of the operation of such a treaty regime was created in the Treaty of Havana of May 22, 1903, which conferred the United States with a right to intervene in Cuba.[442]

A similar arrangement was established by the Treaty of Washington, on November 18, 1903, between Panama and the United States which related to the continuation of order in the Panama Canal zone.[443]

Juridical support for this perspective can also be deduced from the jurisprudence of the Permanent Court. In the Wimbledon Case (1923), the Court held:

> "The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any

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[440] Hertslet, E. The Map of Europe by Treaty , Vol. II, pp.925-928.

[441] British and Foreign State Papers, Vol. LXIX, p.768. See also Hurst, M. Key Treaties for the Great Powers, 1871-1914 (1972), Vol. II, pp.551-577, at pp.574-575.

[442] United States Statutes at Large, Vol. XXXV, pp.897-898. Article III of this Treaty provided:

> "The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for the discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States..."

[443] Consolidated Treaty Series, 1903-1904, Vol. 194, pp.263-271.

> convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But this right of entering into international engagements is an attribute of State sovereignty."[444]

The same reasoning would apply *mutatis mutandis* to treaties instituting a right of interference. Further, the *ratio decidendi* of this decision was approved in the important minority dissent in the Austro-German Customs Union Case, in 1931, when the seven justices of the court in dissent stated:

> "Practically every treaty entered into between independent States restricts to some extent the exercise of the powers incidental to sovereignty. Complete and absolute sovereignty unrestricted by any obligations imposed by treaties is impossible and practically unknown. The "alienation" of the independence of a State implies that the right to exercise these sovereign powers would pass to another State or group of States."[445]

In this case the minority declared that, for the sovereignty of Austria to be compromised, it was insufficient that the proposed customs union be merely a grant of a special regime or exclusive advantage.[446] The rights granted by Austria to Germany necessarily had to amount to the alienation of the organic sovereignty for the independence of Austria to be discarded.[447]

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[444] (1923) P.C.I.J. Reports, Series A, No. 1, p.5, at p.25.

[445] (1931) P.C.I.J. Reports, Series A/B, No. 41, p.33, at p.77. See also Fachiri, A.P. "The Austro-German Customs Union Case", 1932 (XXIII) B.Y.I.L. pp.68-75.

This dicta supports the proposition that the sovereignty of a nation cannot effectively be destroyed without the complete alienation of its free will to the control of another sovereign nation. Treaties of intervention were not classified as instruments which so estranged the sovereignty of the conferring nation, and therefore the allegation that such treaties were invalid appears unfounded. Further, as regards Halleck's proposition that such instruments were inherently immoral[448] , this was equivalent to suggesting that international law was subject to a superior test of morality. However, acts by states done in conformity with international law have never been subject to such a test, and therefore remain legal in international practice. While this ground for intervention remained contentious among the writers of this period, no rational or legal grounds existed to prohibit such interference, so long as the appropriate and relevant treaty conferred *bona fide* rights of intervention.[449]

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[446] Note that the majority opinion in this case did not necessarily deny that such a treaty right could not exist, but rather asserted that, *in casu*, it would be contrary to the provisions of another conflicting treaty obligation.

[447] In the same case, Judge Anzilotti, in his Separate Opinion, at p.58, stated:

> "It follows that the legal conception of independence has nothing to do with a State's subordination to international law or with the numerous and constantly increasing states of *de facto* dependence which characterize the relations of one country to other countries. It also follows that the restrictions upon a State's liberty, whether arising out of ordinary international law, or contractual engagements do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be."

[448] Halleck, op. cit. Chapter IV, Para. 8, p.86.

F. INTERVENTION TO RESTORE THE BALANCE OF POWER.

At this time, the concept of the balance of power was applied to the rough equation of national and political forces which had been established in Europe. In essence this equilibrium was justified by the right of self-defence, and by the fact that it was perceived as substantially contributing to the stability, and general preservation of this region, especially when peace was threatened by the schemes of ambitious nations.

Since the Peace of Westphalia, the principle had played an important role in European history. It found express recognition in the Treaty establishing the Peace of Utrecht, 1713; it was the fundamental tenet of the Vienna Congress of 1815; and was a cardinal element at the Congress of Paris, in 1856, the Conference of London, in 1867, the Congress of Berlin, in 1878, and at the end of the Balkan War in 1913. Although the principle was never directly admitted into the code of international law, it cannot be ignored as a fundamental factor in European co-existence during this period.[450]

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[449] See Davis, G.B. Elements of International Law (1908), p.102.

Possibly the most polemical alleged justification arose in the assertion that intervention was legal when adopted to maintain or uphold the balance of power. Opinion broadly fluctuated as to the legitimacy of such action, those supporting the principle confirming that such action was permissible under an extensive interpretation of the principle of self-defence.[451] For instance, Lawrence explained:

> "As the duty of self-preservation justifies intervention to ward off imminent danger to national life and honour, so the duty of preserving international society justifies intervention to bring to an end conduct that imperils the existence or healthful order of that society. It is true that in each case the independence of the offending state is for the moment violated; but the less must give way to the greater in order to attain a good end..."[452]

Although the exercise of this purported right was predicated upon the unambiguous manifestation of an intention to aggrandize[453] , Lawrence allowed the exercise of such rights notwithstanding the fact that he, and other writers, had earlier stipulated that states were at liberty to act according to their own volition, subject only to the rights of other nations. Indeed, his endorsement of this right was tantamount to an assertion of an extensive form of anticipatory intervention, whenever a nation felt threatened by the increase in power, wealth or influence of a fellow nation.

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[450] See Lorimer, J. Institutes of the Law of Nations (1884), Vol. II, pp.197-208.

[451] See Winfield, loc. cit. p.152; and Woolsey, T.D. International Law (Fifth edition, 1879), pp.44-45.

[452] Lawrence, op. cit. Seventh edition, Part II, Chapter I, Para. 67. Note that no such comments appeared in the first editions of this work, and, therefore, this ground of interference must be attributed to Winfield. See also Davis, G.B. The Elements of International Law (1908), pp.104-108.

[453] Stowell, op. cit. pp.414-431.

Oppenheim also supported this rule, and, as before in the case of intervention for self-preservation, he believed that interference to redress the *status quo* was to be "excused". The motives for such interference were expressed in the following terms:

> "(I)ntervention in the interest of the balance of power...must be excused. An equilibrium between the members of the Family of Nations is an indispensable condition of the very existence of International Law. If the States could not keep one another in check, all Law of Nations would soon disappear, as, naturally, an over-powerful State would tend to act according to discretion instead of according to law."[454]

Although Oppenheim subsequently alleged that this proposition was supported by the practices of states themselves and the preponderance of jurists elaborating upon the topic, this would appear a presumptive statement which can easily be refuted by a doctrinal survey from the period.[455]

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[454] Oppenheim, L. International Law (First edition, 1905), Vol. I, Para. 136, p.185.

In addition to the statements in opposition from the preceding half century, in particular from Wheaton[456] , Hall also adamantly opposed this proposal. He believed that, if such a practice was permissible, then the sole justification for the action would reside in the benefits so procured. Further, he denied that a state had a right, solely by membership of the international society, to intervene to prevent the growth of a nation, merely because it maintained reservations regarding that nation's continued expansion.[457] Hyde similarly disputed the legitimacy of this defence for interference and this author asked why a group of states could be conferred with a right which did not belong to any one of them severally.[458]

On the other hand, state practice does appear to lend an element of support to the principle of intervention to maintain the balance of power. The mere fact that a nation had acquired, or was acquiring, power greatly preponderant to its neighbours was not in itself sufficient to justify intervention to redress the balance of power. However, under such circumstances other states were justified in watching the growing nation with cautious vigilance, and in forming alliances for the purposes of mutual self-defence.

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[455] Oppenheim, ibid, Vol. I, Para. 136, p.185.

[456] Wheaton, H. Elements of International Law (First edition, 1836), Part II, Chapter 1, Para. 3, p.83. (Eighth edition, Part II, Chapter 1, Section 63, p.77.)

[457] Hall, op. cit. Part II, Chapter VIII, Para. 95.

[458] Hyde, op. cit. Vol. 1, Part II, Title A, Section 6, Para. 74, pp.122-123.

If the preponderant nation committed acts of violence against its neighbours, or by the obvious intentions of its diplomatic correspondence, intended harm to these states, or by any other course of conduct, beyond the mere increase of its strength, threatened aggression or oppression against its neighbours, then other states would be justified in combining together for the purposes of intervention, and to prevent that nation from threatening the security of Europe.[459]

However a number of limitations appear to exist to restrict the application of this principle. Firstly, the internal development of the resources of a country, or the acquisition of colonies or dependencies, were never perceived as a pretext for such intervention, despite the fact that such increases in the wealth and population of a state were possibly the most efficacious means of acquiring power and influence. Secondly, the injustice of the statement that nations were at liberty to retard the civilization of a neighbour, and diminish the prosperity of inoffensive neighbours, was to self-evident to permit intervention in such circumstances. Consequently, it would appear that the application of this principle was restricted to interference to sustain the balance of power, in order to confine an already powerful sovereign from incorporating conquered provinces into his existing territories, or from increasing his territory by marriage or inheritance, or from exercizing a directional influence over the councils of independent states, thus reducing them to the status of puppet states.

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[459] Davis, op. cit. pp.107-108.

G. HUMANITARIAN INTERVENTION.

Intervention against a nation for the vindication of moral or humanitarian considerations must also be evaluated in the light of this tendency from legal certainty towards ambiguity and obscurity. Humanitarian intervention was originally adduced as a primarily naturalist concept, but with the proliferation of positivist dogmas in the nineteenth century, legal opinion in general militated against the complete adoption of this principle. The main source of criticism which was leveled against the principle was based predominantly upon the lack of support for the principle in state practice.[460] After the passing of the

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[460] An analogous argument in the modern context is advanced in Brownlie, Use of Force, op. cit. pp.338-342 and Brownlie, I. "Humanitarian Intervention", in Moore, J.N. Law and Civil War in the Modern World (1974), pp.217-228, at pp.218-220. In contrast, see Akehurst, M. "Humanitarian Intervention", in Bull, H. Intervention in World Politics (1984), pp.95-118, and Ganji, M. International Protection of Human Rights (1962), pp.9-16. Commenting on the development of this concept, Lauterpacht commented, in Collected Papers (1970), Vol. 1, at pp.302-304:

> "The independent and sovereign State is by international law given full autonomy with regard to the treatment of its nationals; it is typically a question of domestic jurisdiction. But this exclusive right may be abused. It ceases then to be a right, and the competence of international law to protect the individual is fully restored."

However, this commentator was compelled to admit that there have been no instances of humanitarian intervention, certainly up to 1950, since European powers interfered in first half of the nineteenth century, the principle had been denounced by both Phillimore and Halleck as a concept which could "scarcely be admitted into the code of international law, since it is manifestly open to abuses..."[461]

In fact, an examination of doctrine from the late nineteenth century reveals a substantial discord and disparity of opinion.[462] Oppenheim cast aspersions upon the authority of the principle in the light of the negligible state practice to support the principle[463] , and this perspective was to gain substantial credibility in the twentieth century.[464] Hall also acknowledged that such interference was *ex facie* illegal, however, he was prepared to concede that collective intervention in such a cause could become plausibly more acceptable.[465]

Opposition to this opinion was proffered by a number of writers. A most assertive and adamant defence of the doctrine of humanitarian intervention was maintained by Stowell, who stated:

> "Intervention for humanity, or humanitarian intervention as it is more properly called, is also an instance of intervention for the purpose of

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[460](cont'd) Turkey to prevent the maltreatment of co-religionist groups.

[461] Halleck, op. cit. Chapter XIV, Para. 21, p.340.

[462] See Ganji, M. International Protection of Human Rights (1962), pp.17-22.

[463] Oppenheim, op. cit. Vol. I, Para. 137, p.186.

[464] See Brownlie. loc cit. pp.218-220.

[465] Hall, op. cit. Part II, Chapter VIII, Para. 92. However, it is difficult to to comprehend how an illegal act committed by a collection of states is any more legitimate than when undertaken unilaterally upon the same ground.

> vindicating the law of nations against outrage. For it is a basic principle of every human society and the law which governs it that no member may persist in conduct which is considered to violate the universally recognized principles of decency and humanity."[466]

The naturalist heritage of this statement is as patent as the author's positive support of the concept. Although Stowell appears, *ex facie* to have undertaken an extensive and thorough examination of both precedent and doctrine before concluding the legality of such interference, his reasoning is defective.[467] As a result, his study of this subject may be considered to be inherently weak.

Although it is difficult to defend the legality of humanitarian intervention at this period, a substantial number of authorities vacillated between the polar extremes, attempting to reconcile the discrepancy between the universal moral appeal of the doctrine, and the dearth of state practice to support the proposition. Consequently, in many works a compromise was sought by making the application of the doctrine contingent on the existence of certain circumstances or conditions. Thus, Halleck had believed such intervention could be defended as a subsidiary pretext to other grounds of interference. In a similar vein, humanitarian intervention was often asserted as legitimate when collectively adopted by a number of nations. In this context Hyde maintained:

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[466] Stowell, op. cit. pp.51-52.

[467] For example, compare and contrast the list of authorities cited in support of his proposition, on pp.55-56, note 11, with those who are subsequently listed, at p.58, note 12, in opposition to the concept. Further, his illustrations from state practice are weak and inconsistent, and even, on occasion, misleading.

> "(T)he society of nations, acting collectively, might not unreasonably maintain that a State yielding to such excesses was rendering itself unfit to perform its international obligations, and possibly also thereby inviting war."[468]

Hershey concurred in this instance, providing that, although forcible intervention might be justified on humanitarian grounds, in order to prevent abuse, the exercise of this right should remain collective, and when one nation acted severally, it must receive the sanction of the remaining members of the international society.[469]

Possibly the most ambivalent position regarding this matter was adopted by Lawrence. In acknowledging the widespread divergence of opinion which existed, this jurist compromised by stipulating that the law of nations would not unfavorably regard such intervention, however, no duty was imposed upon a nation to abstain from barbarity against its nationals.[470] International law neither stipulated a right of intervention to protect non-nationals from abuse by their sovereign, nor a duty upon a sovereign to observe basic human rights, but the international society at large would not complain against such action. Each case had to be evaluated upon its merits.

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[468] Hyde, op. cit. Vol. 1, Part II, Title A, Section 6, Para. 72, p.121.

[469] Hershey, op. cit. p.151.

[470] Lawrence, op. cit. Part II, Chapter I, Para. 79, p.120. (Seventh edition, Part II, Chapter I, Para. 66 is the later equivalent of this section). See also Green, L.C. "International Law and the Control of Barbarism", in MacDonald, R.St.J. et al. The International Law and Policy of Human Welfare (1978), pp.239-271, at pp.239-244.

The matter of humanitarian intervention did not exist in an emotional void. Despite the lack of support in state practice, assertions of legitimacy, whether conditional or otherwise, persisted. A veneer of respectability existed in such actions, but this was not sufficient to establish a principle in international law. Even those who argued for the non-existence of this principle appeared uncertain in their convictions. In this respect, despite his misgivings on this subject, Oppenheim stated:

> "(O)n the other hand, it cannot be denied that public opinion and the attitude of Powers are in favour of such interventions, and it may perhaps be said that in time the Law of Nations will recognize the rule that interventions in the interests of humanity are admissible provided they are exercised in the form of a collective intervention of the Powers."[471]

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[471] Oppenheim, op. cit. Vol. I, Para. 137, pp.186-187. In the eighth edition of this work, at Vol. I, Para. 137, pp.312-313, Lauterpacht commented: "The Charter of the United Nations, in recognizing the promotion of respect for fundamental human rights and freedoms as one of the principal objectives of the Organisation, marks a further stage in the direction of elevating the principle of humanitarian intervention to a basic rule of organised international society."

Oppenheim appeared to have pre-empted the ambitions of certain powers which established the League of Nations, and latterly the United Nations, the objectives of which included *inter alia* the protection of minorities, and intervention for certain humanitarian objectives.[472] However, at this period, Oppenheim's opinion merely served to obscure the issue.

H. INTERVENTION IN CIVIL STRIFE.

Although it is quite evident that no other ground for intervention during this period properly satisfied the test of legality, a grave omission would result if the legal implications of intervention in civil strife were omitted from this particular consideration, since a substantial amount of doctrine was established on this subject.

A condition of civil war existed, in its various forms, when two opposing factions within an individual had recourse to arms in an attempt to settle the issue of the reigns of government, or when an element of the population resorted to armed force against the incumbent government.[473] As war, in the sense of the legal term, related to an armed contention between two or more states, then civil war failed to qualify in the technical sense of the term.[474] Consequently, international law did not look upon civil strife as an issue of international implications, but rather classified it exclusively as a matter of internal or domestic concern. Neither the events leading to civil war, nor the actual existence of such an armed conduct, were considered to be international delictual acts *per se*.[475]

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[472] Ganji, op. cit. pp.45-85.
[473] See Thomas, A.V.W. & Thomas, A.J. Non-Intervention (1956), at p.215.
[474] Oppenheim, First edition, op. cit. Vol. II, Para. 59, p.65.

In the course of the nineteenth century, it appears that there developed, in doctrine, a conception of civil armed conflict as being divisible into certain phases: rebellion, belligerency and, in the case of wars of secession, independence.[476] In the course of events leading to the American Civil War, one leading commentator observed the evolution of events in the following terms:

> "The state of things was treated as a rebellion of individuals, risen to the dimensions of a war...The [American] government did...treat the rebels as belligerents, while the war lasted; holding them as prisoners of war, making uses of exchanges and other practices of war."[477]

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[475] Hyde, loc. cit. p.6.

[476] Farer, T. "Foreign Intervention in Civil Armed Conflict", 1974 (142) Hague Recueil pp.297-406, at p.318. Illustrations of this division are present in the following works: Halleck, H.W. International law (1861), Chapter XIV, Para. 9, pp.332-333; Manning, W.O. Commentaries on the Law of Nations (1837), p.98; and Walker, T.A. A Manual of Public International Law (1895), pp.4-5.

[477] Dana's note in Wheaton, H. Elements of International Law (Eighth edition, 1866), Part II, Chapter I, Para. 576, pp.69-72. In the Prize Cases, (1862) 2 Black, p.635, the U.S. Supreme Court acknowledged that: "Insurrection against a government may or may not culminate in an organised rebellion, but a civil war always begins by insurrection against the lawful authorities of the Government. A civil war is never solemnly declared...it becomes such by accidents."

As long as the anti-governmental forces maintained the status of mere rebels, these forces had no international status whatsoever. The incumbent government possessed all its pre-conflict rights and obligations as the sole representative of the state. As a result, the legal status of intervention in favour of such forces was typified by Woolsey who stated:

> "No State is authorized to render assistances to provinces or colonies which are in revolt against the established government...On the other hand, there is nothing in the law of nations which forbids one nation to render assistance to the established government in such case of revolt, if the assistance is invoked."[478]

Opposition to this statement was present in the works of both Hall and Lawrence, the former of whom stated:

> "(I)nterventions, in so far as they purport to be made in compliance with an invitation, are independent of the reasons or pretext which have already been discussed, (and) it must be assumed that they are based either on simple friendship or upon a sentiment of justice. If intervention on the ground of mere friendship were allowed, it would be idle to speak seriously of the right of independence...If again intervention was based upon an opinion as to the merits of the question at

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[478] Woolsey, T.D. Introduction to International Law (Fifth edition, 1879), Para.42, pp.42-43.

> issue, the intervening state takes upon itself to pass judgment in a matter which, having nothing to do with the relations of states, must be regarded as being for legal purposes beyond the range of its vision."[479]

Lawrence also noted that:

> "Any intervention in an internal struggle is an attempt to prevent a people of state from settling their affairs in their own way."[480]

Although these statements appear *ex facie* to be irreconcilable was the positive assertion made earlier, they have to be evaluated in their context. Firstly, despite the fact that both jurists employed the expression "civil war", it is clear from the nature of their earlier writings, and the context of their statements, that they were not referring to all degrees of civil rebellion, but rather only to one in which a strong element of popular support existed for the cause. This would be the principal situation in which domestic authorities would have to resort to outside assistance to support their government. Consequently, the statements made by Hall and Lawrence can be classified as prohibiting intervention in a situation of a virtually international conflict, or a state of belligerence.

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[479] Hall, op. cit. Part II, Chapter VII, Para. 94.

[480] Lawrence, op. cit. Eighth edition, Part II, Chapter I, Para. 68. See also Funck-Brentano, T. et Sorel, A. Precis Du Droit Des Gens (1877), pp.219-220 and Bluntschli, J.C. Le Droit International Codific (Translated by C. Lardy, 1895), pp.476-477.

Secondly, these statements can also be interpreted as an attempt to impose an obligation upon those states confronted with a request for assistance in the repression of internal strife.[481] The standard or test which was to be applied would be comparative to that employed for the purposes of determining the existence of a state of belligerency between the parties.[482] If the rebellious forces satisfied these conditions, then they were entitled to the creation of a duty of non-intervention on the part of outside states. In effect, therefore, as Lauterpacht has commented[483] , the restrictions asserted by Hall, Lawrence and others can be seen as no more than a detailed application of the rules relating to belligerency.[484]

Where civil strife had evolved, conciliatory interposition and mediation were always permissible in circumstances when the invitation was extended from both parties to the conflict.[485] However, where the request for mediation or arbitration originated from a unilateral request, then the obligation to refrain from interference was strictly upheld.

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[481] Lauterpacht, E. "Intervention by Invitaion", 1958 (7) I.C.L.Q. pp.102-108.

[482] See text below, pp.212-215.

[483] Lauterpacht, loc. cit. p.105.

[484] Commenting upon the common assertion of absolute non-intervention in such circumstances, Baty observed:

> "[I]t seems that this proposition only obtained currency because of the bad, or at least unpopular, nature of the Governments which were propped up in the nineteenth century by the Holy Alliance."

Baty, T. The Canons of International Law (1930), pp.99-100.

[485] For example, see Hall, op. cit. Part II, Chapter VIII, Para. 94.

This original three tier system gradually evolved another stage with the evolution of a condition termed "insurgency", which was a twilight area intermediate between rebellion and belligerency. This status was necessitated by the practicalities of international life, since the insurgents could have effectively established control over areas of territory in which third party interests were present, and which would thereby be compromised.

A state of insurgency existed when an insurrection with a political purpose had assumed the proportions of war "in a material sense", and when it seriously interfered with the exercise of sovereignty or with normal foreign intercourse.[486] Although the existence of such a contest did not constitute civil war in the legal sense of the term, the situation had passed beyond the state of a mere mob outbreak or riot, to the state of a competition between the government and an organized movement with responsible and identifiable leaders. Consequently, insurgency was an intermediate stage between a condition of internal tranquility and a state of all-out civil war.[487]

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[486] Hershey, A.S. Essentials of International Public Law (1921), p.118. The distinction between "the recognition of the existence of war in a material sense and war in a legal sense", was made by Chief Justice Fuller in the case of The Three Friends (1896), 166 U.S.R. p.1, at pp.63-99.

[487] In the code of land warfare prepared by Francis Lieber and adopted by the U.S. War Department on April 24, 1863, the distinction between "insurrection" and "civil war" is made in the following terms:

> 149."Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government."
>
> 150."Civil war is war between two or more portions

The existence of a status of insurgency could be recognized by both the parent state and third parties.[488] When insurgency was recognized by the parent state, this implied the admission of certain rights and duties relating to the conduct of hostilities. For example, the governmental forces were obliged to treat insurgent combatants as prisoners of war rather than as traitors or pirates.[489] However, insurgents were not permitted to exercise the right of search on board neutral vessels, or to blockade the ports of the mother country, or to capture vessels for engaging in the carriage of contraband or in unneutral service.[490]

Recognition of insurgency by third parties was merely tantamount to an acknowledgment of the facts of the situation.[491] In addition, such a declaration also implied

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[487] (cont'd) of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the State are contiguous to those containing the seat of government."
Taken from Wilson, G.C. International Law (Ninth edition, 1935), Appendix 2.

[488] Lauterpacht, H. Recognition in International Law (1947), pp.270-278.

[489] Hershey, ibid, p.118.

[490] Lawrence, T.J. Principles of International Law (Fourth edition, 1913), Part III, Chapter I, Para. 143, pp.354-355.

[491] An illustration of the recognition of insurgency is provided by U.S. President Cleveland's Proclamation of 1895, which instructed American nationals to observe the U.S. neutrality laws during the second Cuban insurrection. Reproduced in Moore, J.B. Digest of International Law (1906), Vol. I, Para. 74, p.242. See also Chen, T. & Green, L.C. The International Law of Recognition (1951), pp.398-407, in which a number of cases in front of domestic tribunals are discussed which relate to this subject-matter and period.

certain obligations on the part of the recognizing state[492], and also a number of rights, including the protection, where possible, of the lives and property of neutrals, and freedom from search and capture by insurgent vessels.[493]

On the other hand, recognition of insurgency conferred upon the anti-governmental forces certain rights vis-a-vis third parties. In particular, it was not possible to treat these forces as pirates. Further, it was also alleged that such recognition meant that the insurgent forces were legally permitted to interdict the supply of materials to their domestic enemy.[494]

The admission of insurgency did not, however, create a new international legal relationship between the parties, such as the recognition of belligerency implied, although it did make the execution of domestic laws more burdensome. Such recognition merely afforded acknowledgment of the facts of the insurrection. It was essentially a domestic act, which had the objective of:

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[492] In 1900 the Institute of International Law declared: "In case of an insurrectionary movement or civil war, International Law imposes upon third powers certain obligations toward established and recognized governments which are in conflict with an insurrection".
The supply of arms, ammunition, and finance to the insurgents was prohibited, and it was especially prohibited to allow the organization within a state or territory of military operations hostile to incumbent governments. See Scott, J.B. Resolutions of the Institute of International Law (1916), pp.157-159.

[493] See the memorandum of U.S. Secretary of State, Hay, to the Minister of Bolivia, of March 14, 1899, in Moore, op. cit. Vol. I, Para. 74, p.243.

[494] Hershey, op. cit. p.119.

> "...drawing the attention of the public to a state of fact in a foreign state which calls for special recognition."[495]

Consequently, whether the insurgency was recognized or not, the obligations owed by a foreign state to the state in which the civil conflict existed continued.

If the rebellious forces were successful in achieving their objectives, then the next phase of this system - belligerency - would come into operation.

The concept of belligerency evolved in the first quarter of the nineteenth century as a result of the actions of Great Britain and the United States at the time of the South American revolutions. However, it was only in the later half of that century that the status became clearly defined, and in particular in connection with the American Civil War and the Cuban insurrections of 1868-1878 and 1895-1898.[496]

The minimum requirements for the existence of this state were summarized in the following passage:

> "When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have

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[495] Chen & Green, op. cit. p.400. See also the Messages of U.S. President Grant and President Cleveland, in Moore, Digest, op. cit. Vol. I, Para. 67, p.194, and Vol. VII, Para. 1332, p.1080.

[496] See Wright, Q. "The American Civil War, 1861-65", in Falk, R.A. The International Law of Civil War (1971), pp.30-109. See also Beale, "The Recognition of the Cuban Belligerency", 1896 (9) Harvard Law Review, p.406. On the controversy relating to the so-called premature recognition of the Southern confederacy by Great Britain on May 13, 1861, see Moore, Digest, op. cit. Vol. I, Para. 66, pp.184-193.

> declared their indepedence; have cast off their allegiance; have organised armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest as war."[497]

In effect, a status of belligerency was established when an insurrection attained the proportions of a public civil war in a legal sense. When a state of belligerency existed, then the state recognizing this condition would be obliged to assume the obligations of neutrality, similar to the existence of a state of international war.

Again, a situation of belligerency could be recognized by both the parent state or third parties. Recognition of belligerency by the parent state was generally believed to have two practical effects: (1) it conferred certain rights and imposed certain corresponding obligations on the insurgent community; and (2) it released the parent Government from certain prior obligations and created certain new rights.[498]

In those situations in which the parent state was unwilling to acknowledge the existence of a condition of belligerency, foreign states were at liberty to so recognize, but only where the criteria necessary for the condition were present. Where the anti-government forces were engaged in the struggle and no possibility of subjugation appeared likely, and if the rebels were organized and in control of territory, then such recognition was not unjustified.[499]

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[497] The Prize Cases (1862), U.S. Supreme Court, 166 U.S.R., p.1. See also Oppenheim, First edition, op. cit. Vol. II, Para. 76, p.86; Westlake, J. International Law (1904), Vol. 1, pp.50-57; Dana's note in Wheaton, H. Elements of International Law (Eighth edition, 1866), Part I, Chapter II, Para. 23, pp.29-32, note 15; and Hall, W.E. A Treatise on International Law (First edition, 1880), Para. 5, pp.33-34.

[498] Walker, T.A. A Manual of Public Intrenational Law (1895), pp.4-5.

When a foreign nation recognized the belligerency of a civil conflict, this was tantamount to releasing the parent state from the responsibility for acts of the belligerent forces or omissions on the part of the parent state. The insurgent forces thereby gained the advantage of being permitted to commission cruisers at sea, and to obtain loans on the credit of the state.[500] Further, once a situation of belligerency was declared, both parties acquired rights of search and visit against neutral shipping, and to all the rights conferred upon the parties to a maritime war.

In such a situation, a neutral party was required to adhere to the absolute principle of non-intervention. Not only was support of rebel forces prohibited, but intervention on the part of the parent state was also interdicted.[501] The general duty of third parties was to observe the obligations of neutrality.[502] The direct ramifications of the duty of neutrality and impartiality was necessarily adherence to an absolute obligation of non-intervention, and it was this condition in which support for the incumbent government was no longer legitimate.

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[499] This issue is discussed in this historical context in Chen & Green, op. cit. pp.333-351.
[500] Dana's note, op. cit. p.31.
[501] See the earlier opinions of Hall and Lawrence, text above, pp.206-207.
[502] A number of these duties were authoritatively declared in the Treaty of Washington, May 8, 1871, between Great Britain and the United States relating to the settlement of claims arising out of the American civil war. This treaty declared the duties of non-belligerents to be, *inter alia*:

502(cont'd)

"First: To use due diligence to prevent the fitting out, arming, or equpping, within its jurisdiction, of any vessel which it has reasonable grounds to believe is intended to cruise or to carry on war against a Power with which it is at peace... Secondly: Not to permit or suffer either belligerent to make use of its ports or waters as a base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men." Consolidated Treaty Series, 1871-1872, Vol. 143, pp.145-162, at p.149. See also the Alabama Arbitration (1872), in Moore, J.B. History and Digest of International Arbitrations, Vol. I, p.653.

VIII. THE INTERPRETATION AND DEVELOPMENT OF THE PRINCIPLE IN THE AMERICAS.

In the examination of intervention, in the sense of limited military incursions, a particularly anomalous feature of the history of the South American continent is the myriad of multifarious occasions upon which acts of interference have been executed.[503] By way of contrast to the conduct of European nations *inter se*, interventions in the South American hemisphere were especially frequent. Evidence suggests this to be a consequence of a number of factors; however the disparity of military strength was of paramount significance between those nations performing the interventionary acts and the victim states.[504] This scenario was significantly accentuated given the comparative naval, economic and strategic advantages of these powers.

A bifurcation is further evident in the dissection of this period of particular state practice, which corresponds to the division between the north and south subcontinents. In the United States of America the doctrine enunciated by President Monroe in 1823, and the subsequent interpretation of its implications, directly interposed a formidable and practical limitation on European colonization and incursions into both continents.[505] However, the substantive expansion of this message and its connotations portended sinister consequences for the autonomy of a number of members of the Latin American family of nations, particularly those situated in the Central American region and the Caribbean basin.

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[503] Certain jurists have advanced the opinion that the principle was a product of virtually exclusive Inter-American international relations. For example, Thomas, A.V.W. & Thomas, A.J. Non-Intervention (1959), at p.3 state:

> "The principle of non-intervention...may be traced to the inceptive period of the American republics as independent nations. It is a culmination of the long history of the foreign relations of these nations and the attitudes and ideas of their statesmen and jurists, which crystallized into a determination to codify the principle as an integral part of American international law."

However, the origins of the principle are traced through European international legal literature in Winfield, P.H. "Intervention in International Law", 1922 (III) B.Y.I.L. pp.130-149.

[504] For support of this proposition in contemporary international law, see Bull, H. Intervention in World Politics (1984), pp.1-16.

Material augmentation of the norm additionally resulted from international protests voiced by South American nations to the apparent incessant violations of their territorial integrity and political sovereignty. The ramifications of this unimpeded interference, initially by European powers, and latterly by the United States, led not only to the enunciations of the Calvo and Drago Doctrines[506] , but also to the ultimate enthronement of the principle of absolute non-intervention, in treaty form, as a principle of pan-American international legal relations.[507]

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[505] See text below, pp.232-240.
[506] See text below, pp.258-270.
[507] See Thomas & Thomas, op. cit. pp.55-64.

A. EARLY UNITED STATES FOREIGN POLICY.

The foundations of North American foreign policy have been pre-ordained by the geographical situation of the American continent relative to the powers of Europe.[508] The ratification of the federal constitution, and the inauguration of a stable government, confirmed the inalienable independence of this nation, and a paramount objective of the first executive administration was to extrapolate a "policy of isolation".[509] This policy was not an original conception, but was rather a synthesis of a number of political statements attributable to influential American statesmen.[510]

From the inception of the conflict between France and the allied monarchical powers of Europe, President Washington had reiterated a policy of isolation by announcing the neutrality of the United States towards the belligerents.[511] On April 22, 1793, the President declared in the proclamation of neutrality that American citizens should cultivate impartial relations toward the belligerents, and that violations of this edict would be "liable to punishment or forfeiture under the law of nations."[512] This neutral posture was reinforced by the promulgation of the first Neutrality Act of June 5, 1794.[513] Under the provisions of this legislation, Congress established a number of offences, including the enlisting in the services of a belligerent within the territory of the United States, the fitting out or arming of vessels for the purpose of committing hostilities against a belligerent, and the preparation of military expeditions against a belligerent from American soil. All these measures were adopted in conformity with the general American policy of isolation.

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[508] See Alvarez, A. The Monroe Doctrine (1924), pp.4-6, and Martin, C.E. The Policy of the United States as Regards Intervention (1921), pp.19-69.
[509] Hart, A.B. The Monroe Doctrine: An Interpretation (1917), pp.10-12.
[510] Hart, ibid, pp.8-10.
[511] The background to this policy is discussed in Martin, op. cit. pp.36-50. For the history of Euro-American diplomatic relations in this era see, Bemis, S.F. A Diplomatic History of the United States (Fifth edition, 1965), pp.35-110.

Revolutionary France repeatedly attempted to solicit assistance from the United States against the European coalition arrayed against it, invoking the spirit of international republican fraternity. In 1793, the revolutionary government of France proposed the drafting of "a national agreement, in which two great peoples shall suspend their commercial and political interests and establish a mutual understanding to defend the empire of liberty, wherever it can be embraced."[514] In his Farewell Address of September 19, 1796, President Washington refuted these propositions in terms which clearly foreshadowed the Monroe doctrine. In declining all invitations to participate in the European turmoil, Washington stated:

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[512] This Declaration is reproduced in Moore, J.B. Principles of American Diplomacy (1918), at p.41.
[513] United States Statutes at Large (1845 edition), Vol. 1, pp.381-384.
[514] Moore, Principles, op. cit. p.199.

> "Europe has a set of primary interests which to us have none or a very remote relation. Hence, she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities."[515]

North American public opinion at this period fully endorsed these sentiments, and in the subsequent elections, the primary political contention concerned the future policy of the United States towards the conflict in Europe.[516]

This fortification of the doctrine of isolation was eventually to procure its logical corollary: that there existed an obligation incumbent upon the United States to restrict as far as possible alien interference in the North American subcontinent. The first explicit manifestation of this expanded policy related to the attempt by the United States to inhibit the transfer of North American territory by European nations *inter se*. In contrast to the assertion of the territorial *status quo*, the United States adopted the more aggressive strategy in order to influence and regulate such territorial conveyances to its own advantage. This modification and adoption of policy were justified by reference to the potential dangers to the American territorial integrity of the transfer of areas of the continent to potentially hostile, and militarily superior, European powers.

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[515] Richardson, J.D. Messages and Papers of the Presidents, 1789-1897 (1896), Vol. I, pp.213-224, at p.222.

[516] See Bemis, S.F. "Washington's Farewell Address: A Foreign Policy of Independence", 1934, Vol. XXXIX American Historical Review, pp.250-267.

This policy extension germinated in the alleged danger of the territorial transactions between France and Spain. In the conclusion of the secret Treaty of Saint Ildefonso of October 1, 1800, between France and Spain, which retroceded the province on Louisiana to France, France had automatically become a far more formidable potential adversary.[517] Fortunately for the United States, Napoleon subsequently agreed to market the territory to the United States in order to finance certain military adventures.[518]

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[517] Secret Treaty between France and Spain, October 1, 1800 in Consolidated Treaty Series, 1799-1801, Vol. 55, pp.377-378. Upon the discovery of this pact by the U.S. Ambassador to Great Britain, President Jefferson, in March 1801, wrote:

> "The cession of Louisiana and the Floridas by Spain to France works most sorely on the United States...The day that France takes possession of New Orleans fixes the sentence which is to restrain her forever within her low-water mark. It seals the union of two nations (France and Spain), who, in conjunction, can maintain exclusive possession of the ocean. From that moment, we must marry ourselves to the British fleet and nation."

Bergh, A.E. The Writings of Thomas Jefferson (1907), p.313.

[518] This treaty transferred a total of 1 182 752 square miles of territory. In present terms, the extent of the cession comprised: all those portions of Alabama and Mississippi south of the thirty-first line of latitude; the whole of the present states of Louisiana, Arkansas, Missouri, Iowa, and Nebraska; all of Minnesota west of the Mississippi River; all of Kansas except a small portion west of the one-hundredth meridian; all of North and South Dakota and Montana; and most of Wyoming and Colorado. The stipulated price was $15 000 000. See Davis, C.K. A Treatise on International Law (1901), pp.256-262.

This sale was also undertaken since the depletion of the French fleet had rendered the successful defence of the region by French forces impractical.[519]

The United States later annexed West Florida by military force in several increments between 1810 and 1814, under the pretext of the protection of American nationals. North American expansion was also occasioned by the ceding of East Florida, the territorial transfer being ratified by Spain in 1821.[520] By 1820 the territory of the United States had been substantially increased, and only twice had the neutrality of the nation been compromised.[521]

B. LATIN AMERICA AND SELF-DETERMINATION.

The successful revolution of the United States and its achievement of independent status contrasted with the development of South America which remained the exclusive domain of colonial empires. The vast estates of the Spanish Empire dominated the southern hemisphere, and only Brazil, the paragon of Portugese colonial heritage, and a number of smaller dominions, impeded complete regional hegemony by the Spanish crown. Consequently it was inevitable that the destiny of this region would be determined by events extraneous to the hemisphere.

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[519] See Bemis, op. cit. pp.126-137. See also Duroselle, J.B. France and the United States (1978), pp.43-45.

[520] Proces-Verbaux between Spain and the United States for the Transfer of East Florida, July 10, 17, 1821, in Consolidated Treaty Series, 1821-1822, Vol. 72, pp.111-117.

[521] See generally, Waciuma, W. Intervention in the Spanish Floridas, 1801-1813 (1976), especially pp.32-93 and pp.178-195.

The incumbent Bourbon monarch of Spain had declared war on France in 1793, but the preponderant French forces completely subjugated the Spanish army, and Spain was forced to sign the Treaty of St. Ildefonso of August 19, 1796, through which Spain became the ally of France.[522] In 1808 Napoleon, on the pretext of traversing Spanish territory to invade Portugal, and thereby isolate Great Britain, turned against his ally and overthrew the incumbent monarchical government of Charles IV, and designated his brother as King Joseph Bonaparte of Spain.[523] The premium of this invasion was perceived as the Spanish overseas colonial heritage. However, instead of the instant and overwhelming victory which Napoleon anticipated, the Spanish campaign brought havoc, ruin and destruction to both France and Spain.

By 1809 liberal revolutions had been instigated in Peru, Mexico, and a number of other Spanish dependencies. But despite substantial popular sympathy, the insurgent forces appeared insufficiently substantial to withstand the coercive influence which would be eventually leveled when Spain regained its composure.[524] Only in Venezuela was a semblance of a *de facto* provisional revolutionary government manifested which took the imperative step of proclaiming itself independent of all former Spanish colonial potestas.[525]

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[522] The Treaty of St, Ildefonso, in the Consolidated Treaty Series, 1795-1797, Vol. 53, pp.257-266.

[523] See Fyffe, C.A. A History of Modern Europe (Second edition, 1891), pp.367-401.

[524] Despite substantial American sympathy with the revolutionaries, the United States did not deviate from its course of strict neutrality, and the refusal to permit recognition to be premature. President Madison issued a proclamation warning all citizens to have no part in hostile expeditions against the colonies of Spain. See Richardson, op. cit. Vol. I, pp.561-562.

With the assistance of the British army, the former monarch, Ferdinand VII, was eventually restored to the Spanish throne. In order to restore the full extent of the former Spanish Empire he dispatched a naval fleet, reinforced with a formidable army, to quell all rebellion in South America, and to restore direct monarchical overlordship. The Spanish forces were initially successful in this action, and all the rebellious colonies capitulated with the exception of Buenos Ayres (the Argentine Republic) which formally declared its independence on July 9, 1816, and which is generally accredited with being the first factually independent Latin American nation, although automatic recognition of this status was not immediately forthcoming.

The Spanish forces were unable to permanently excise the influential and persuasive forces of liberal revolution, and when latterly combined with the existence of internal revolution within Spain itself, a second era of revolution was precipitated. The ultimate consequence of this event was the factual attainment of independence for Chile, Columbia, Mexico, and certain other former colonies. Brazil, also followed this precedent and declared itself independent in 1822, drafting for itself an autonomous constitution based on the model of the North American republican model.[526]

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[525] See generally, James, H.G. & Martin, P.A. The Republics of Latin America (1923), pp.79-109, which provides the background and causes of these revolutions. For the events in Venezuela at this time, see Robertson, W.S. History of the Latin-American Nations (Third edition, 1943), pp.157-159.

President Madison proclaimed the neutrality of the United States in the forthcoming conflict between Spain and its former colonies.[527] However, this declaration was indirectly tantamount to the recognition of the comparatively recent innovation of the international legal status of belligerency.[528]

The North American government subsequently re-enacted legislation which consolidated the criminal code applicable to American citizens engaged in this conflict. This legislation extended the definition of offences to incorporate as unneutral service, service against or on behalf of a "colony, district or people", as well as against "any foreign prince or State" with which the United States was at peace.[529]

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[526] Robertson, op. cit. pp.164-178.

[527] See Moore, J.B. Digest of International Law (1906), Vol. I, Para. 61, pp.171-172.

[528] See Hershey, A.S. Essentials of International Public Law (1912), pp.119-123, and also Chen, T. The International Law of Recognition (1951), pp.307-332 and pp.335-342. In his first annual message to the American Congress, on December 2, 1817, Madison stated:

> "[The United States] have regarded the contest, not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having, as to neutral powers, equal rights. Our ports have been open to both; and every article, the fruits of our soil, or the industry of our citizens, which either was permitted to take, has been equally free to the other. Should the colonies establish their independence, it is proper now to state that the government neither seeks nor would accept from them any advantage in commerce or otherwise which will not be equally open to all other nations."

In subsequent litigation in the North American courts, a substantial history of jurisprudence evolved in the interpretation of these statutes.[530] Although the United States acknowledged the state of belligerency between Spain and her colonies, it carefully refrained from any acts which could be construed to imply the recognition of the independence of the former colonies. The recognition of belligerency falls far short of the recognition of a government or of a new independent state.[531]

Throughout this period the provisional governments established in Latin America petitioned the United States for the recognition of their independence.[532] Only after the elapse of a considerable period of time, and the continued practical independence of these colonies, in contrast to the obvious impotence of the Spanish government, did President Monroe, in his annual message of December, 1821, and again in a special message of March 8, 1822, propose the *de jure* recognition of Buenos Ayres, Colombia, Chile and Mexico.[533]

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[529] United States Statutes at Large, Vol. 3, pp.370-371 and pp.447-450.

[530] See for example, Chacon v Eighty-Nine Bales of Cochineal (1821) 5 Federal Cases 391, at p.394. British jurisprudence concerning this issue is discussed in Bushe-Fox, P.L. "Unrecognized States: Cases in the Admiralty and Common Law Courts, 1805-1826", 1932 (XIII) B.Y.I.L. pp.39-48.

[531] Some of the problems and consequences of limited recognition are illustrated in the Law Officers opinions collected by McNair, A.D. in International Law Opinions (1956), Vol. II, pp.327-339.

[532] American State Papers, Foreign Relations, Vol. IV, pp.181-182. See also Griffen, C.C. The United States and the Disruption of the Spanish Empire, 1810-1822 (1968), pp.121-160.

[533] On March 8, 1822, Monroe commented:

The U.S. Congress overwhelmingly supported this proposal and granted sufficient appropriation "for such missions to the independent nations of the American continents as the President of the United States may deem proper".[534] Within twelve months diplomatic relations had been established between the United States and Buenos Ayres, Colombia and Chile. Several months thereafter Brazil and Mexico were also afforded such recognition.[535] The United States had shown itself willing to support these nations, at least diplomatically, in an effort to break the commercial monopoly of the South American continent held until then by Spain. Before the end of 1823, Spanish and Portugese colonial dominion in South America had been practically eradicated except in Cuba, Puerto Rico, and around a number of seaports.

In European circles, concern with the colonization of the west coast of the northern continent, together with interest in the independent political development of the central and southern regions, had not subsided nor diminished as a consequence of the impoverishing continental war, but rather had been merely suspended.[536] In Spain these

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[533](cont'd)

> "When the result of such a contest is manifestly settled, the new governments have a claim to recognition by other powers, which ought not to be resisted."

American State Papers, Foreign Relations, Vol. IV, pp.818-819.

[534] Moore, Digest, op. cit. Vol. I, Para. 36, p.86.

[535] Moore, Digest, op. cit. Vol. I, Paras 28-37. See also Whitaker, A.P. The United States and the Independence of Latin America, 1800-1830 (1962), pp.370-395.

[536] For a general synopsis of European interest in the

wars of independence were regarded as no more than temporary set-backs and the declarations of independence as no more than the oratorical rhetoric of rebels.[537] The reimposition upon France of a monarchial government led to a coalition between France and Spain to reassert dominion over these alleged renegade provinces, but even this was ultimately to prove insufficient. The French motives for such assistance were not completely altruistic. Having been stripped of its own colonial empire, France hoped to profit from its participation in the reinstatement of colonial rule, and therefore, was disinclined to support these rebellious colonies, or to recognize these entities as independent states.

British interests were not completely satisfied in the continued suppression of the Latin American colonies which inherently led to a Spanish commercial monopoly. This government conducted its foreign policy in this respect

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[536] (cont'd) continents at this time, see Hart, op. cit. pp.40-54, and Tatum, E.H. The United States and Europe, 1815-1823 (1962), pp.1-27.

[537] On March 9, 1822, the Spanish ambassador to the United States protested against the proposed recognition and stated that:

> "[The United States] can in no way now, or at any time, lessen or invalidate in the least the right of Spain to the said provinces, or to employ whatever means may be in her power to reunite them to the rest of her dominion."

In reply, U.S. Secretary of State, Adams, reminded the ambassador that, in the recognition of nations, the principles of right and fact were involved; the former depending exclusively upon the determination of the nation itself, and the latter resulting from the successful execution of that determination. See American State Papers, Foreign Relations, Vol. IV, p.846. See also Lauterpacht, H. Collected Papers (1970), Vol. 1, p.313.

towards the ultimate aim of the fragmentation of the Spanish colonial empire in Latin America. In such circumstances, British traders and merchants would profit, and would also be the ultimate beneficiaries in this trade expansion. To this extent Great Britain inclined towards to recognition of the status of belligerency which pertained to the relations of Spain towards its former colonies.[538]

Due to a number of factors, including geographical circumstances, Russian interest in the continent was not focused primarily upon the fledgling Latin American republics, but rather concentrated upon the northern hemisphere of the continent. Russia had already claimed Alaska and a number of islands adjacent to the west coast of North America.[539] However, on September 7, 1821, the Russian czar, Alexander I, promulgated a ukase which claimed a substantial area of the west coast of North America.[540] The publication of this edict was the source of unlimited resentment amongst American citizens and their government, and indeed, this legislation was a primary catalyst to the subsequent elaboration of the non-colonization principle in the Monroe Doctrine. Conversely, the desire to substantiate this claim was a prime motivating factor for the vociferous support from the Russian czar in the councils of the Holy Alliance for the provision of support by France to Spain to reconquer her former colonies, and thereby weaken North American control on this hemisphere.

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[538] See Ward, A.W. & Gooch, G.P. The Cambridge History of British Foreign Policy (1923), Vol. II, pp.64-68.
[539] See Tatum, op. cit. pp.113-140.
[540] See Alaska Boundary Tribunal Proceedings, Vol. II, at p.25.

A further factor which eventually led to the elaboration of the Monroe Doctrine was the spectre of direct intervention by the Holy Alliance to assist Spain to reaquire her Latin American colonies. This loose confederation eventually adopted the mantle of the protectors of the divine rights of monarchs to subjugate their citizens, in opposition to the revolutionary principle of the organized self-government of the people.[541] The ultimate manifestation of the volition of this assemblage was revealed by the Protocol of Troppau which declared that these sovereigns viewed as a threat the continuation of revolution in Europe.[542]

The ambitions of the Alliance did not dissolve with the successful restoration of the monarchy in Spain. At the Congress of Verona, Ferdinand had petitioned the Alliance for assistance in the subjugation of resistance movements in the colonies of South America, and general support for this proposition had been solicited. Consequently, the ambitious designs of the Holy Alliance threatened to extend towards the Latin American continent, in order to procure the recovery of the Spanish lost possessions. The United States was most apprehensive at this possibility, and this factor precipitated the pronouncement of the non-interference principle inherent in the statement of the Monroe doctrine.[543]

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[541] Moore, Digest, op. cit. Vol. VI, Para. 930, pp.374-379.
[542] Phillips, W.A. The Confederation of Europe (1914), at p.222.

In order to discuss and deliberate upon the problems presented by the revolutionary forces in the central and southern regions of America, those powers which had assembed at Verona proposed a conference to discuss American affairs and issues to which Great Britain and the United States were cordially invited to attend.[544] Both of these states viewed this proposal as repugnant, and as an unwarranted interference in American domestic affairs.

Eventually the British Foreign Secretary, Canning, confronted the French Foreign Minister, Polignac, to settle once and for all, the issue of the French designs upon the New World. The French government, in the face of British political and naval hostility to these proposals, conceded that the subsequent proposed recolonization of the sub-hemisphere was impossible. The French Minister was compelled to declare that "his government believed it to be utterly hopeless to reduce Spanish America to the state of its former relation to Spain."[545] Further, Polignac disclaimed any "intention or desire" on the part of France "to appropriate to Herself any part of the Spanish Possessions in America, or to obtain for Herself any exclusive advantages."[546] Implied recognition of the impossible predicament of Spain was later conceded by the Holy Alliance in its abandonment of the proposed conference, and the withdrawal of the French troops from Spain.[547]

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[543] See Stockton, A.A. The Monroe Doctrine and Other Addresses (1898), pp.15-18.
[544] See Canning's reaction to this proposal in Temperley, H. & Penson, L.M. Foundations of British Foreign Policy (1938), pp.75-76.
[545] Temperley & Penson, ibid, pp.70-76, at p.73.

However, neither North American public opinion nor the statesmen of this nation were sufficiently assuaged by the successful British diplomatic intervention, and popular revulsion to the designs of the Holy Alliance, coupled to the extravagant territorial claims of the Russian czar, found authoritative expression in the imminent enunciation of the Monroe Doctrine.

C. THE FORMULATION OF THE MONROE DOCTRINE AND NON-INTERVENTION.

In his seventh annual address of December 2, 1823, U.S. President Monroe outlined the principal framework for the conduct of future American foreign policy applicable to the international relations between the Old World and the New World and in this statement several fundamental principles were enunciated.[548] Through the medium of this address,

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[546] Temperley & Penson, ibid, at p.73. See also Cambridge History of British Foreign Policy, op. cit. Vol. II, pp.64-68.

[547] Hart, op. cit. p.84.

[548] On the legal status of this declaration itself, note the following comments by Davis:

> "It should be borne in mind that the declarations known as the Monroe doctrine have never received the sanction of an act or resolution of the Congress, and for that reason form no part of the municipal law of the United States; nor do they have any of the authority which European governments attach to royal ordinance. They are, in fact, only the

Monroe elaborated the two main pillars of the "non-colonization" principle, and the "non-intervention" principle. In establishing the non-colonization principle, the U.S. President stated:

> "(T)he occasion has been judged proper for asserting as a principle in which the rights and interests of the United State are involved, that the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European Powers."[549]

Technically this portion of the address was a reformulation of the earlier statement of Secretary of State Adams replying to the Russian ukase of 1821 which allegedly asserted title to the west coast of North America.[550]

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[548](cont'd) declarations of an existing administration of what its own policy would be, and what it thinks should ever be the policy of the country on a subject of paramount and permanent interest."
Davis, G.B. Elements of International Law (1908), at p.112. in the same context, Moore stated:

> "The "Monroe Doctrine" has in reality become a convenient title by which is denoted a principle that doubtless would have been wrought out if the message of 1823 had never been written - the principle of the limitation of European power and influence in the Western hemisphere."

Moore, J.B. Principles of American Diplomacy (1918), pp.258-259. Therefore, it would appear to be a widespread view that the Monroe Doctrine was a political formulation, with little or no reference to a foundation upon international law.

[549] Richardson, op. cit. Vol. II, pp.207-220.

[550] Moore, Principles, op. cit. at p.245. In this context Adams had informed the Russian government that the United States:

> "...should contest the right of Russia to any territorial establishment on this continent, and...we should assume distinctly the principle that

The fundamental objective of this part of the statement was to emphasize the commitment of the United States to ensure that the northern hemisphere was no longer to be considered as *terra nullius*. The United States government believed that the claims of European nations, especially Great Britain and Russia, represented a direct threat to the nation's continued national security. In the interests of future U.S. self-preservation, the American President found it necessary to proclaim this principle[551], but its scope also incorporated central and south regions of the continent which were no longer to be regarded as *ferae naturae*, and thereby not susceptible to colonization from Europe.[552]

This interpretation of the territorial status of the American continents was acceptable to neither Great Britain nor Russia, both of which regarded the vast unoccupied regions of North America as open to future colonization. In protesting this portion of the address the British Foreign Secretary, stated:

> "(T)he United States had no right to take umbrage at the establishment of new colonies from Europe on any such unoccupied parts of the American continent."[553]

And subsequently the Foreign Secretary informed the U.S.

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[550](cont'd) the American continents are no longer subjects for any new European colonial establishments."

[551] A defence of the Monroe doctrine, based on the principle of self-preservation is given in Fenwick, C.G. Foreign Policy and International Law (1968), p.30.

[552] See Dana's note 36, in Wheaton, H. Elements of International Law (Eighth edition, 1866), Part II, Para. 68, pp.82-94 at pp.84-85.

[553] Alvarez, op. cit. at p.32.

Ambassador to Great Britain that:

> "If we were to be repelled from the shores of America, it would not matter to us whether that repulsion were effected by the Ukase of Russia excluding us from the sea; or by the new doctrine of the president prohibiting us from the land. But we cannot yield obedience to either."[554]

The Russian reception of the message was met with cold indifference which underscored the Russian evaluation of the strength and commitment of this new nation.[555]

A number of uncertainties were inherent in President Monroe's interpretion of the international legal status of the northern landmass in America.[556] Monroe's proposition that the areas were no longer suitable for colonization could only have legal efficacy if the complete American continent was actually in the possession of so-called civilized peoples under the legal order applicable at that time. However, Monroe's declaration extended to territories discovered and claimed by Great Britain and Russia; to territory presumed to be in the possession of insurgents whom the United States alone recognized; and also to additional territory which only subsequent exploration would reveal.[557] It is, therefore, difficult to see how the United

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[554] Temperley, op. cit. at p.128.

[555] Perkins, D. Hands Off: A History of the Monroe Doctrine (1941), p.57.

[556] See Higgins, A.P. "The Monroe Doctrine", 1924 (V) B.Y.I.L. pp.103-118, especially pp.109-110.

[557] The essence of this part of the statement rests upon the presumption that every part of the territory of the American continent formed a part of, or was embraced in, the

States, by mere declaration, could affect the status of lands claimed, discovered or ruled by other powers.[558] The status of modern Alaska at that time was uncertain, as was that of the regions now known as the Northwest Territories and the Yukon. Further, in the west coast of the northern continent, aside from Oregon, the sole evidence of possession by any nation was scattered settlements and outposts. These areas were certainly still the

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[557] (cont'd) territorial limits of some then existing state, and that, as a result, there remained no territory in the western hemisphere capable of occupation or colonization. This was, certainly factually, untrue. As Oppenheim observed in his first edition of International Law (1905), Vol I, Para. 140, at pp.190-191, since the law of nations was equally applicable to all the existing members of the family of nations, the states of the American continent were subjects of the same rights and duties as those of Europe. Consequently, the European states were legally entitled, as far as international law was concerned, to acquire territory in the Americas as elsewhere. Further, this author also commented that the same legal rules respecting intervention were equally applicable to nations of either source.

[558] The American writer Hyde, in his work International Law As Chiefly Applied And Interpreted By The United States (First edition, 1921), in Vol. 1, Para. 88, justified the doctrine upon the basis of a theory that:

> "...the several American territorial sovereigns enjoyed by virtue of constructive occupation, exclusive rights of sovereignty which should be respected."

Similarly, Taylor, in his work A Treatise on International Public law (1901), Para. 113, at pp.150-151, justified the doctrine in the following terms:

> "The Monroe doctrine finds its recognition in those principles of international law which are based upon the theory that every nation shall have its rights protected and its just claims enforced."

In both these defences, the authors appear to be alleging that all states have equal rights under international law, but the American states have a claim to certain superior rights by virtue of their proximity and geography. Such propositions are extremely difficult to prove given the virtually universal acceptance of the international rights relating to the aquisition of territory which existed at that time.

subject-matter of dispute between Great Britain, Russia and the United States.

Also certain areas of the continent held by the United States which had formerly belonged to Spain remained contested and were therefore of a dubious legal status.[559] Although under international law the United States was entitled to proclaim in advance the policy which it would adopt when questions of title were to arise, no such unilateral declaration was capable of fundamentally altering substantive international law. The legal status of the continent could only be altered by the renunciation of all rights by those nations claiming areas of the continent as their colonial domain.

However the second element of this doctrine was an innovation. This novel aspect was the obvious natural corollary to the doctrine of two spheres: that European nations should reciprocate, and abstain from acts of interference in the development and gradual maturing of the American continents. More precisely Monroe stated:

> "We owe it...to candor, and to the amicable relations existing between the United States and those (European) powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as

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[559] In particular, the United States claim to the areas known as the Floridas was contested by the Spanish authorities. See Moore, Digest, op. cit. Vol. I, Paras 101-102, pp.433-445. See also Perkins, D. The Monroe Doctrine, 1823-1826 (1932), pp.20-25.

> dangerous to our peace and security. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the Governments who have declared their independence, and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States."[560]

The dual nature of this political doctrine thereby becomes apparent. Henceforth, certain mutual and reciprocal considerations were expected for the future North American abstention in European affairs, notwithstanding the fact that this represented the essence of pre-existing U.S. foreign policy.

Aside from the question of whether the Monroe statement itself could be represented as diplomatic interference in the domestic colonial concerns of Spain, the principle of non-interference maintained by Monroe could itself by interpreted as an inherently interventionary doctrine. Under Monroe's hypothesis, *ex facie* any act by a European power in the American continents would henceforth be construed by the United States as an unfriendly or hostile act towards the

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[560] Richardson, op. cit. Vol. II, pp.207-220.

United States, regardless of the legality of this action under the international legal structure of that time. Despite the inconsistent and opaque nature of this area of international law at this period, this system did maintain the distinction between an illegal and legal interventionary act.

In Monroe's thesis, any act of interference was automatically ascribed an offensive and unfriendly determination, thereby justifying the appropriate North American counteraction. This thesis further failed to identify the essential connection between the act and the element of undue coercion in the legal evaluation of a European action.[561] This suggests that political advantage was the criterion upon which President Monroe established the foreign policy of the United States, and not the canons of international law. This attitude is further evidenced by the fact that the United States felt that its subsequent interference in European interventionary acts in Central and South America was sufficient to justify retaliation, but without reference to the principles of international law.

The address, coupled with the subsequent *de jure* recognition by Great Britain of Buenos Ayres, Mexico and Colombia, produced the desired effects predicted by the American administration.[562] This action immediately fortified the commercial, economic and political position of the United States in world affairs, and in this sense the doctrine was an unqualified success.

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[561] See Vincent, R.J. Non-Intervention and International Order (1974), pp.107-113, at pp.111-112.

[562] The circumstances surrounding the British recognition of independence of the Spanish colonies are discussed in Smith, H.A. Great Britain and the Law of Nations (1932), Vol. I, p.149. See also the Cambridge History of British Foreign

However, it is obvious that the Monroe doctrine was a political, and not a legal, concept.[563] Although the doctrine, by a broad stretch of the legal imagination, could be defended by reference to the broad subjective principles of self-preservation and the maintenance of the balance of power[564], at the time President Monroe made no attempt to confer or endow his statement with legal characteristics. He believed that each nation was naturally endowed with the inherent right of the people to self-government and popular representation, based broadly of the principles of republicanism, although he may have over-extended himself in the application of this notion to entities which were not at that time legally independent.

The principles of non-colonization and non-interference in the context of their exposition in the doctrine were innovations, and although international law does not invariably or automatically relegate each and every innovation to the category of illegality, rarely does a unilateral act qualify as instant international law. This applies equally to the Monroe doctrine, although a number of international jurists have since asserted that the legal status of these principles has subsequently become

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[562](cont'd) Policy, Vol. II, pp.73-78.
[563] Hyde, op. cit. Vol. 1, Paras 85-97, pp.133-161.
[564] See Oppenheim, L. International Law (1905), Vol. I, Part I, Chapter II, Sec. 140, pp.190-191.

positive.[565]

D. EUROPEAN INTERVENTION IN THE AMERICAN CONTINENT.

The diplomatic success of the address was conceded in the growing number of European nations, latterly including Spain and Portugal, which recognized the *de jure* nature of the Latin American republics, expressly or impliedly, in the decade following the address. In strict legal theory, these states therefore had entered the international society of states on terms of equality as conferred by international law. However in practical terms, European nations applied different rules and principles of international law in their dealings with these new nations, in contradiction to the rules which regulated their relations *inter se*. As Hershey observed:

> "(D)uring the greater part of the nineteenth century at least, intervention in Europe always rested upon some important principle of internal politics, such as the balance of power, or upon some great moral or religious interest favourable to the development of civilization; while in the new world the intervention of European states has rested upon no legitimate principles, being based upon mere force and a failure to recognize the complete freedom and independence of American states."[566]

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[565] For example, see Alvarez, op. cit. pp.26-31.

[566] Hershey, A.S. "The Calvo and Drago Doctrines", 1907 (I) A.J.I.L. pp.26-45, at p.27.

The first international jurist to highlight this discriminatory treatment was Calvo who observed that, notwithstanding political motives, European interference in Latin America, although almost invariably adduced upon a legal pretext, were legitimated on dubious legal authority. Interference was asserted as legal when applied to retribution for injuries to private interests, and compensation for pecuniary indemnity for claims on behalf of their nationals.[567] Calvo refuted the legitimacy of such interventions alleging:

> "According to the strict international right, the recovery of debts and the pursuit of private claims does not justify *de plano* the armed intervention of governments, and, since European states invariably follow this rule in their reciprocal relations, there is no reason why they should not also impose it upon themselves in their relations with the new world."[568]

Although the simplicity and natural justice of this proposition are both unquestionably compelling, this was probably not an accurate statement of international law at the time.[569]

The virtually unrestricted exercise of military coercion by European powers against the integrity of Latin

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[567] See generally, Calvo, C. Le Droit International: Theorique et Pratique (Fifth edition, 1896), Tome I, Livre III, Paras. 185-206.

[568] Calvo, ibid, Tome I, Livre III, Para. 205, pp.350-351. Translation by Hershey, loc. cit. p.27.

[569] See text above, pp.183-185.

American nations in the first half of the nineteenth century was their solution to the alleged dereliction by these weaker states to fulfil their postulated international obligations. This scenario greatly favoured the European imperialistic powers which inflicted retribution with the overwhelming preponderance of military advantage in their favour. Naval capacity was capable of transcending the obstacle presented by the vast expanse of ocean which separated the two continents. Consequently, instances of both unilateral and collective intervention feature predominantly throughout the early history of the interaction of these worlds. Only with the eventual interposition of the United States did this situation become more acceptable, but American assistance was ultimately to be substituted for American interventionism.

The first empirical test of the Monroe doctrine was the North American reaction to the British action of reoccupying the Falkland Islands in 1833.[570] For a considerable period the sovereign title to these islands had been contested by Spain and Great Britain, both powers maintaining settlements on the territory.[571] For reasons of economy, the British garrison at Fort Egmont was recalled in 1774, whilst the Spanish colony was withdrawn in 1811 as a consequence of the contraction of the Spanish Empire.

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[570] See Clark, J.R. Memorandum on the Monroe Doctrine (1928), pp.113-116.

[571] See generally Goebel, J. The Struggle for the Falkland Islands (1971, Reprint), especially pp.221-270; Hoffman, F.L. & Hoffmann, O.M. Sovereignty in Dispute: The Falkland / Malvinas, 1493-1984 (1984), pp.17-30; and Stowell, E.C. International Cases (1923), Vol. I, pp.209-217.

In 1820, four years after the factual independence of the embryonic Argentinian nation, a vessel was dispatched from Argentina to proclaim the sovereignty of these islands for the Argentinian people. However, no effective administrative occupation was undertaken, although a factually autonomous colony was established on the islands under the supervision of a privateer named Vernet.[572] This settlement was deliberately dispersed by an American naval vessel after these settlers had unlawfully seized certain American fishing vessels and their respective crews.[573]

Upon the fulfilment of this punitive action, the British government thought the moment propitious to reclaim the islands. On January 2, 1833, the British corvette, H.M.S. Clio, appeared at Fort Egmont to formally resume possession of the territory on behalf of the British sovereign.[574] In response to the protests of the Argentinian government against this action, the British Foreign Secretary, Palmerston, refuted the accusation that Great Britain had manifested any *animus reliquendi*, and reasserted the claim of Great Britain to the sovereignty of the islands.[575]

The United Stated declined to intercede between the two powers to settle the dispute and subsequently the American government defended this indifference by explaining that the territorial dispute between the two nations lay outwith the ambit of the Monroe doctrine, since the resumption of actual occupation of the Falkland Islands by Great Britain took place under a claim of title which had been previously asserted and maintained by that government.[576]

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[572] See Green, L.C. "The Falklands, the Law and the War", 1984 (38) Yb. W.A. pp.89-119, at pp.97-101.
[573] Goebel, op. cit. pp.438-455.
[574] Goebel, op. cit. pp.455-459.
[575] Green, loc. cit. at p.103.

Further North American apathy was occasioned at the time of the French blockade of Buenos Ayres. The Argentinian government had promulgated a decree which compelled foreigners, including a number of French nationals, to perform military service on the same basis as Argentinian nationals. This situation gradually escalated into confrontation, and on March 28, 1838, France instituted a naval blockade of Buenos Ayres and the adjacent littoral.[577] France also occupied the important strategic island of Martin Garcia, and began to meddle in the internal politics of Argentina and the neighbouring republic of Uruguay.[578] The dispute was eventually resolved by the interposition of Great Britain, and subsequent recourse to negotiation, which ultimately produced the Mackau-Arana convention settling the dispute.[579] Since no potential existed for permanent European territorial aggrandizement, it appears that the United States was content to have the matter settled by other parties, although the infraction of the non-intervention principle is self-evident.

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[576] Moore, Digest, op. cit. Vol. VI, Para. 944, p.435.
[577] Perkins, 1826, op. cit. pp.51-55.
[578] See Cady, J.F. Foreign Intervention in the Rio de la Plata, 1832-1850 (1929), pp.22-91.
[579] Consolidated Treaty Series, 1840-1841, Vol. 91, pp.111-114.

In 1845, the Rio de la Plata region was again blockaded, coercion being jointly imposed by French and British naval forces.[580] In 1844 Argentina had attacked Uruguay, and, as a result, Britain and France were compelled to blockade the region in an attempt to coerce Argentina to desist from interfering in Uruguay since they had jointly guaranteed the independence of that state. Although the Argentinian government vigorously solicited assistance from the United States, this was not forthcoming, and the United States refrained from protesting the action.[581] However, the United States administration did insist upon an explanation of the intentions of these powers in the region, and, thereby, obtained assurances that no territorial ambitions were premeditated.

The first major positive affirmation of the Monroe doctrine was illustrated in the diplomatic and political actions of the United States in regard to the tripartite European intervention in Mexican internal affairs.[582] At London, a convention was drawn up among Great Britain, France and Spain which declared the intention to collectively vindicate a number of financial claims held against Mexico by their respective citizens, and to procure future guarantees for the protection of their nationals resident in Mexico.[583] The parties to the convention expressly renounced any intention of permanently acquiring territory in the region, and stated that they would refrain from exercising "in the internal affairs of Mexico any influence of a nature to prejudice the right of the Mexican nation to choose and constitute the form of its government."[584] To ensure the prompt payment of these alleged financial obligations, the three powers successfully instituted the blockade, and additionally seized certain portions of Mexican territory, including the port of Vera Cruz.

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[580] See generally, Pfeil, A.R. The Anglo-French Intervention in the River Plate (1847).
[581] Cady, op. cit. pp.160-192.
[582] See Thomas & Thomas, op. cit. p.16.

The three powers invited the United States to accede to the treaty and participate in the enforcement action. In declining this proposal, the U.S. Secretary of State, Seward, on December 4, 1861, had replied:

> "(T)he President does not feel himself at liberty to question...that the sovereigns represented have undoubted rights to decide for themselves the fact whether they have sustained grievances, and to resort to war with Mexico for the redress thereof, and have the right also to levy the war severally or jointly...(but) the United States have a deep interest...that neither of the sovereigns by whom the convention has been concluded shall seek to

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[583] British and Foreign State Papers, 1860-61, Vol. LI, p.61, and the Consolidated Treaty Series, 1861, Vol. 52, pp.447-450.

[584] See Taylor, H. A Treatise on International Public Law (1901), Part III, Chp. VI, Para. 412, pp.414-415.

> obtain any acquisition of territory or any advantage peculiar to itself."[585]

Although the European intervention had been sanctioned, this action was limited by the repetition of the non-colonization principle of the Monroe doctrine.[586]

However, the French monarchical government had contrived its participation in the scheme as a pretext for the attempt to impose a French colonial administration in Mexico. This ulterior motive became apparent as the French forces pushed towards, and ultimately captured, the Mexican capital. In spite of this deception, the British and Spanish governments were successful in negotiating a settlement of their claims. Their mission completed, the British and Spanish forces withdrew in April 1862, not wishing to lend even implied support for the French aspirations.[587]

Under the pressure of the French forces, a provisional Mexican government was established under the rule of Archduke Maximilian of Austria.[588] Although at this time the United States was immersed in internecine conflagration, the United States government was not completely incapacitated.[589] Throughout the existence of the Maximilian

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[585] Moore, Digest, op. cit. Vol. VI, Para. 956, at p.486.

[586] See Clark, op. cit. pp.134-137.

[587] Moore, Digest, op. cit. Vol. VI, Para. 957, pp.488-489.

[588] See Martin, P.F. Maximillian in Mexico (1914), pp.93-150.

[589] The hostile disposition of the United States to the events transpiring in Mexico is evident in the Resolution of the House of Representatives which, without dissent, resolved:

> "(T)he Congress of the United States are unwilling by silence to have the nations of the world under the impression that they are indifferent spectators

regime, the United States consistently refused to recognize the French puppet government as the legitimate authority in Mexico, instead insisting that the Juarez republican administration was the *de jure* government of Mexico.[590] Great Britain also refused to recognize the Imperial Government of Maximilian, and Palmerston stated that the British government was not inclined to recognize the regime since such an act would be dependent upon the acts and wishes of the Mexican people.[591]

The North American government was not content to merely adopt resolutions condemning the situation in Mexico. As soon as the restoration of the Union was assured the United States proposed assistance to the republican forces in Mexico, and began to coerce France into relinquishing the territory. Although, in the absence of French forces, it was obvious that the Maximilian government would capitulate, Seward demanded from the French government that a schedule be agreed for the immediate withdrawal of French forces. In the face of imminent direct U. S. participation on the side of the republican forces, France agreed to withdraw foreign

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[589](cont'd) of the deplorable events now transpiring in the Republic of Mexico, and that they think fit to declare that it does not accord with the policy of the United States to acknowledge any monarchical government erected on the ruins of any republican government in America under the auspices of any European power."
Moore, Digest, op. cit. Vol. VI, Para. 957, p.496.

[590] See Dana's note 41, in Wheaton, H. Elements of International Law (Eighth edition, 1866), Part II, Para. 76, pp.105-110, at p.108.

[591] See Davis, C.B. Elements of International Law (1908), pp.114-115.

troops from Mexico in return for an undertaking that the United States would remain neutral in the subsequent conflict between the contending forces of Juarez and Maximilian.[592] Deprived of logistical support from Europe, the Mexican empire of Maximilian capitulated in 1867, leaving the victorious republican forces of Juarez as the new administrative order.[593]

By 1895 the United States had emerged as the undisputed authority in America, anxious to reassert its fiat over events occurring in Central and South America. The legal demarcation of the boundary between Venezuela and British Guiana had long been a source of contention between the two adversaries, the origins of the controversy extending far into colonial history.[594] In 1840 the British settlers extended their previous claim of territory into lands claimed by Venezuela. Further, spasmodically this boundary was extended by the British settlers to incorporate even larger areas of territory. Eventually, between 1885 and 1886, the geographical area of British Guinea had increased by approximately forty percent in one year.[595]

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[592] This intervention has generally been accepted as legitimate. Acts of intervention undertaken for the purpose of preventing or terminating prior illegitimate interferences on the part of another state were permitted. Although the original collective intervention was probably, at this time, legitimate, the subsequent occupation of Mexico by French troops was not because of the degree of disproportionality which it implied. See Lawrence, T.J. Principles of International Law (First edition, 1895), p.124.

[593] An explanation of the causes and background of this intervention is given in Hodges, H.G. The Doctrine of Intervention (1915), pp.174-206.

[594] See Bloomfield, L.M. The British Honduras-Guatemala Dispute (1953), pp.51-63 and pp.78-97.

Britain continued to reject any offers made by Venezuela to submit the dispute to arbitration. Diplomatic relations between the two nations were suspended, and attempts by the United States to mediate were ineffectual. The United States was particularly irritated by the British refusal to arbitrate since the United States had recently accepted an adverse arbitral decision in the Behring Sea Arbitration.[596] In 1895 Venezuela appealed to the United States for assistance in securing appropriate dispute resolution procedures. In a despatch to the British government of July 20, 1895, the U.S. Secretary of State, Olney, invoked the Monroe doctrine, in an innovative formulation, in order to try to induce the British into arbitration. To justify his interposition, Olney stated:

> "That there are circumstances under which a nation may justly interpose in a controversy to which two or more other nations are the direct and immediate parties is an admitted canon of international law."[597]

This despatch continued to elaborate a number of other principles originating in the address, which were designed to coerce Great Britain into the negotiating forum.[598]

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[595] See Bemis, op. cit. pp.415-416 and Perkins, D. The Monroe Doctrine, 1867-1907 (1937), pp.136-153.
[596] See The Behring Sea Controvesy, Proceedings of the Tribunal of Arbitration at Paris (1895), in fifteen volumes.
[597] Moore, Digest, op. cit. Vol. VI, Para. 966, p.546.
[598] See Oppenheim, First edition, op. cit. Vol. I, Para. 138, pp.315-316; Westlake, J. The Collected Papers of John Westlake on Public international Law (1914), pp.414-418; and

Lord Salisbury took issue with the American Secretary of State over a number of proposition which he had made. In his reply of November 26, 1895, the Foreign Secretary stated, *inter alia*, that the issue:

> "...has nothing to do with any of the questions dealt with by President Monroe. It is not a question of the colonization by a European Power of any portion of America. It is not a question of the imposition upon the communities of South America of any system of government devised in Europe. It is simply the determination of the frontier of a British possession."[599]

Although he believed the doctrine to be inapplicable to the dispute in question, he did recognize that the substance of the doctrine was sound.[600] But the suggestion that the Monroe doctrine was a principle of international law was adamantly refuted. In this context he continued:

> "International law is founded on the general consent

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[598] (cont'd) Young, G.B. "Intervention under the Monroe Doctrine: The Olney Corollary", 1942, Vol. LVII, Political Science Quarterly, pp.247-280.

[599] Moore, Digest, op. cit. Vol. VI, Para. 966, p.561.

[600] Lord Salisbury appears to have admitted the right of the United States to interpose in a controversy when its own national interests were involved, and also to be the judge of the degree to which such interests were compromised. But he refuted the proposition that the United States was entitled to affirm, as a universal proposition, with reference to the independent states of Latin America, for whose conduct it naturally assumed no responsibility, that its interests were concerned simply because of the geographical location of a certain state within the American hemisphere. This does appear to represent an accurate statement of the law. See Hyde, op. cit. Vol. I, Para 91, p.293.

> of nations; and no statesman, however eminent, and no nation, however powerful, are competent to insert into the code of international law a novel principle which was never recognized before, and which has not since been accepted by the government of any other country."[601]

President, Cleveland, decided to make the issue one of public discourse, to solicit public support against Great Britain[602] and rendered a reinterpretation of the Monroe doctrine which led to the "Cleveland Doctrine". In an address of December 17, 1895, Cleveland extended the original non-colonization principle by stating:

> "If a European power, by an extension of its boundaries, takes possession of the territory of one of our neighbouring Republics against its will and in derogation of its rights, it is difficult to see why to that extent such European power does not thereby attempt to extend its system of government

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[601] Moore, Digest, op. cit. Vol. VI, Para. 966, p.563. Two opinions of the Law Officers which are pertinent to this assessment of the Monroe doctrine in international law, are reproduced in McNair, A.D. "Aspects of State Sovereignty", 1949 (XXVI) B.Y.I.L. pp.6-47, at pp.45-46. In these opinions, the Law Officers advised that, under international law, the United States did not have a right to intervene in any controversy between another State in Latin America and a European power, unless the action of either party to the dispute seriously menaced the national interests of the United States. The Monroe Doctrine was represented as "a declaration of policy", which was not always consistently stated, and which could only be justified on the principle that the acquisition of political control over an American state by European nations would be so prejudicial to U.S. interests as to necessarily entail substantial international complications.

[602] Perkins, Hands Off, op. cit. p.179.

> to that portion of this continent which is thus taken."[603]

Further, Cleveland substantiated the earlier contention of Olney that the doctrine constituted international law, and, as a result, any interpretation which the U.S. President gave to the doctrine automatically became international law. Thus he continued:

> "The Monroe doctrine finds its recognition in those principles of international law which are based upon the theory that every nation shall have its just rights protected and its just claims enforced."[604]

Faced with the real prospect of a direct confrontation with the United States, the British government conceded to arbitrate the matter and on February 2, 1897, at Washington, an agreement to arbitrate the controversy was concluded by Great Britain and Venezuela.[605]

The last notable intervention in South America by European nations prior to the initiation of the First World War was the collective intervention of Great Britain, Germany and Italy against Venezuelan domestic sovereignty.[606] It was alleged that Venezuela had failed to respect its international obligations, and it was maintained that a number of international claims lay against that nation relating to national claims for injuries sustained during the civil conflict in that state and also in settlement of certain contractual liabilities.[607] With the hostile disposition of the United States towards Great Britain in the Venezuelan boundary dispute still in mind, Germany conveyed a memorandum to the United States Secretary of State, Hay, outlining the grievances of these parties, and describing negotiations with the Venezuelan authorities as unproductive. Although the memorandum informed the United States of the imminent blockade of the Venezuelan coast, Germany repudiated and denounced any intention of the "acquisition or the permanent occupation of Venezuelan territory."[608]

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[603] Moore, Digest, op. cit. Vol. VI, Para. 966, p.577.

[604] Moore, Digest, op. cit. Vol. VI, Para. 966, p.578. This statement is directly employed by Taylor, op. cit. Para. 113, pp.150-151, to justify the legality of the doctrine.

[605] Consolidated Treaty Series, 1896-1897, Vol. 184, pp.188-196 and Moore, Digest, op. cit. Vol. VI, Para. 583.

[606] Perkins, 1867, op. cit. pp.319-395.

Earlier, U.S. President Roosevelt had elaborated on his administration's interpretation of foreign policy. On December 3, 1901, he had stated the proposition that the Monroe Doctrine:

> "...has nothing to do with the commercial relations of any American power, save that it in truth allows each of them to form such as it desires. We do not guarantee any State against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American power."[609]

The statement of this principle, together with the economic and military power of the United States, was tantamount to dictating the law regarding the international collection of outstanding obligations in Latin America. Such action could only be permissible if no territorial gains were entertained. Where such benefits as European colonization, expansionism or territorial aggrandizement were envisaged, the United States professed itself to possess the right to counter-intervene.

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[607] Moore, Digest, op. cit. Vol. VI, Para. 967, pp.586-591.
[608] Moore, Digest, op. cit. Vol. VI, Para. 967, p.588.
[609] Moore, Digest, op. cit. Vol. VI, Para. 967, p.590.

The claims of the creditor nations were subsequently adjudicated by a mixed claims commission established at Caracas. However the issue of the legality of the preferential payment of the blockading powers over other creditors had eventually to be resolved by the Hague Permanent Court of Arbitration.[610]

The physical intervention by these collective powers in Venezuela appears to have, in fact, been sanctioned by the Permanent Court of Arbitration. This Court upheld the claim of the blockading states to preferential treatment in Venezuela's undertaking to honour these foreign obligations.[611] By intervening in the affairs of this state for the purposes of enforcing the debts owed to their nationals, these countries were successful in securing their claim to the debt, as a direct result of the military coercion brought to bear against Venezuela. If the Court had not believed that such intervention was legitimate, then it would have rejected the claims of the blockading parties, or at least adversely commented on the nature of the action.[612] On the contrary, the Court sanctioned the actions of these powers when it acknowledged that resort to force was necessary in the face of the continued refusal of Venezuela to arbitrate these matters.

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[610] Scott, J.B. The Hague Court Reports (1916), pp.55-76. See also Stowell, Cases, op. cit. Vol. II, pp.7-24.
[611] Scott, ibid, p.56.

The essential point of this final description is to illustrate the deference paid by the intervening powers to the United States in the formulation of their scheme. This demonstrated that these powers recognized that the United States maintained a certain authority respecting the settlement of disputes in Central and South America. In practice it would appear that European powers acknowledged the principle prohibiting European colonization or expansion in the region. However it would be difficult to characterize this as a principle of international law.

In elaborating his formula for foreign policy, Monroe had made no pretensions as to the legal credentials of the policy, and indeed founded the doctrine on political logic and reasoning. But, in subsequent international legal reasoning, it has been argued that the Monroe doctrine did at some indeterminate point, attain legal validity.[613] However such assertions must be fundamentally questioned. In answer to the question of the legality or otherwise of the

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[612] See Chibambo, T.N. Unilateral Use of Force in the Protection of Nationals Abroad and Present International Law (1981), at p.8.

[613] See Fenwick, C.G. "The Monroe Doctrine and the Declaration of Lima", 1939 (33) A.J.I.L. pp.257-268, at pp.258-260.

Monroe doctrine, Brierly eloquently observed:

> "The Monroe doctrine is a policy which the United States has followed in her own interest more or less consistently for more than a century, and in itself is not contrary to international law, though possible applications of it might easily be so. But certainly it is not a rule of international law. It is comparable to policies such as the "balance of power" in Europe...Apart from other objections, it is impossible to regard as a rule of law as doctrine which the United States claims the sole right to interpret, which she interprets in different senses at different times, and which applies only as and when she chooses."[614]

E. THE REACTION OF LATIN AMERICAN STATES AND WRITERS TO INTERVENTION.

In graphic contrast to the economic success and military growth of the United States, virtually all of the new republics established in Latin America were disorganized, volatile and destitute. The manifestation of repetitious incursions by European powers into the sovereign concerns of these nations was a direct product of this imbalance of power. As a result, a number of international jurists attempted to embody into the code of international law a principle which would prohibit such interventions unless justified by a similar legal regime which pertained between European nations.

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[614] Brierly, J.L. The Law of Nations (Fifth edition, 1955). pp.314. See also Oppenheim, op. cit. Vol. 1, Para. 140, pp.190-191. Also Higgins, A.P. "The Monroe Doctrine", 1924 (V) B.Y.I.L. pp.103-118, at pp.113-118.

During the nineteenth and early twentieth centuries, these precarious and disturbed conditions within the newer states of Latin America had led to a continual flow of complaints of injury by foreigners, and to a resort to armed interventions, some of which have been witnessed.[615] A lack of confidence in the local standards of justice generated a refusal by foreigners to resort to local remedies for redress of their grievances. As a result, there was an overwhelming tendency by these subjects to complain to their respective governments which occasioned both diplomatic intervention, and often, eventually, armed intervention for the satisfaction of complaints. This double-standard of treatment led to a revulsion which is reflected in a number of works of international jurists from this region. Instrumental in this process was the Latin American jurist, Calvo.

In 1868, Calvo published his principal treatise, Le Droit International: Theorique et Pratique, which embodied the aspirations of a number of Latin American jurists in this respect. In this work, he elaborated a number of innovative legal arguments in an attempt to protect Latin American republics from the continual violation of their sovereignty. In that portion of his work, entitled "Mutual

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[615] See text above, pp.241-258.

Duties of States", Calvo emphatically denied that a government could invariably be held imputable for injuries sustained by alien nationals in times of civil conflict.[616] The consequence of the continual responsibility of governments for each and every act of insurgents, and groups beyond their control, would be inequitable. He stated:

> "To admit in such cases the responsibility of government, i.e. the principle of indemnity, would be to create an exorbitant and fatal privilege essentially favourable to powerful states and injurious to weaker nations, and to establish an unjustifiable inequality between nationals and foreigners."[617]

After citing a number of authorities as evidence of the *opinio juris* of this proposition, Calvo restated his doctrine in the following terms:

> "It is certain that foreigners who establish themselves in a country have the same protection as nationals, but they cannot lay claim to a protection

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[616] Calvo believed that South American states were not to be embarrassed by international claims based on vicarious responsibility for acts of their officials, or riots and insurrections, which had resulted in damage to the property of aliens, provided that the damage, or failure to recompense, could not be attributed to measures of a discriminatory character. Claims of a proprietary nature were to be brought by the aliens themselves and were exclusively subject to both municipal law and domestic jurisdiction. See generally, Calvo, C. Le Droit International: Theorique et Pratique (Fifth edition, 1896), Tome III, Livre XV.

[617] Calvo, ibid, Tome III, Livre XV. Translated in Hershey, A.S. "The Calvo and Drago Doctrines", 1907 (1) A.J.I.L. pp.26-45, at p.27.

> more extended. If they suffer any wrong they ought to expect the governments of the country to pursue the delinquents, but they should not claim from the state to which the authors of the violence belong any indemnity whatever."[618]

Calvo denied that there existed a double standard of state responsibility regarding the treatment of nationals and aliens. In the absence of such a higher standard of care, not only were such claims extinguished, but further, neither diplomatic nor military intervention was an option to the national state of the alien.

In the naval interventions of France, Great Britain and Spain in Mexico, Argentina and Venezuela, the pretext for the action had been to obtain reparations for injuries received by nationals during civil disturbances, or other occasions of violence, and for breach of contract or default in the repayment of capital or interest in loan stock transactions. Calvo refuted the contentions that such interference was legitimate, instead asserting that the principle of sovereignty was virtually sacrosanct, thereby asserting an extensive principle of non-intervention. In his perception of international legal responsibility, diplomatic protection and intervention on behalf of nationals were restricted to situations where the maltreatment was directly attributable to the governmental or police authorities, and therefore armed intervention was unavailable in the compulsory procurement of outstanding delictual and contractual obligations.[619] Calvo did not absolutely prohibit the possibility of diplomatic protection when ill-treatment was occasioned by officials of the state. Rather he attempted to remove the onus of risk from the national authorities, onto those promoting and incurring these obligations.

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[618] Calvo, ibid, Tome III, Livre XV, Section 1297, pp.155-156. Translated in Hershey, loc. cit. at p.28.

However, these broad sweeping statements did not engender the universal support which has traditionally been necessary to characterize rules as international law. In particular, international jurists in Europe and North America not only refuted his opinions on such matters, but also denied the legitimacy of such propositions.[620] Additionally, the prevailing tendency was towards international arbitration over matters such as the treatment of aliens, and the proposal to treat claims of a proprietary nature as claims under municipal law had little to commend it.

This fact notwithstanding, a certain number of Calvo's ideas were transformed into practices in South America, particularly in treaties, constitutiuonal provisions, statutes and contracts with aliens, in order to secure observance of the rule of local remedies, and to thereby circumvent the possibility of intervention, diplomatic or armed. Treaties were drafted by which Latin American states limited their liability and international responsibility for aliens. For example, Article 6 of the Treaty of July 16, 1897, between Spain and Peru, provided:

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[619] Hershey, loc. cit. at pp.26-28.
[620] See text above, pp.183-186.

> "Spaniards in Peru and peruvians in Spain shall enjoy the same civil rights as citizens or subjects...Spaniards in Peru and Peruvians in Spain shall not be entitled to diplomatic intervention except in the event of a manifest denial of justice, that is failure or negligence in the administration of it."[621]

Constitutional or statutory provisions were also enacted to reduce the possibility of international responsibility, and the prospect of intervention. In attempting to secure the rule of local remedies, a Salvadorean statute of September 29, 1886, stated:

> "Foreigners may appeal to diplomatic intervention only in the event of a denial or of a wilful delay in the administration of justice, and after having had recourse, without result, to all the ordinary means established by the laws of the Republic."[622]

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[621] Consolidated Treaty Series 1897, Vol. 185, pp.428-435, at p.434. These treaties, and such practices were criticized by the Institute of International Law. The Regulations Respecting the Responsibility of States, adopted at Neuchatel, in 1900, provided: "The Institute of International Law expresses the view that States avoid inserting in treaties clauses of reciprocal absence of responsibility. It believes that these clauses are wrong in excusing States from accomplishing their duty of protection of their nationals abroad and their duty of protection of aliens in their territory." Scott, J.B. Resolutions of the Institute of International Law (1916), pp.159-161, at p.161.

[622] British and Foreign State Papers, Vol. LXXVII, pp.121-122. This laws was protested by both the British and American governments. See Moore, Digest, op. cit. Vol. VI, pp.267-268.

In general, juristic opinion tended to downplay the effectiveness of such provisions.[623] Thus, a Harvard Research Study on the Responsibility of States, in Article Two, typified international opinion in stating:

> "The responsibility of a State is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding."[624]

The Calvo doctrine was also modified into a form which became known as the Calvo Clause. This clause was inserted into contracts concluded between Latin American states and alien contractors or concessionaires.[625] The provision not only rendered alien contactors susceptible to local jurisdiction and laws, but also involved the personal waiver of the diplomatic protection of the national state, which was tantamount to a renunciation of the rights endowed upon a state by international law.[626] Such clauses in these agreements were particularly litigious, and a number of international arbitral bodies considered the legality of this issue.[627] Ultimately in the North American Dredging

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[623] See Goebel, J. "The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars", 1914 A.J.I.L. pp.802-852, at p.831.

[624] See Briggs, H.W. The Law of Nations (1938), p.522.

[625] See generally, Lipstein, K. "The Place of the Calvo Clause in International Law", 1925 (XXII) B.Y.I.L. pp.130-145; and Freeman, A.V. The International Responsibility of States for the Denial of Justice (1938), pp.469-490.

[626] Lipstein, ibid, pp.131-137.

[627] A discussion of this case-law is given in Feller, A.H.

Company Claim (1926), a Mixed Claims Commission ruled such clauses to be ineffectual in circumventing the international rights of a state to protect a national. Specifically, in this authoritative decision, the Commission stated:

> "Under the rules of international law may an alien lawfully make such a promise [to renounce the right of diplomatic intervention]? The Commission holds that he cannot deprive the government of his nation of its undoubted right of applying international remedies for violations of international law committed to his damage."[628]

A similar attempt to protect the sovereign integrity of Latin American nations, but restricted to pecuniary claims, was made by Drago, an Argentinian Minister for Foreign Affairs.[629] In essence the Drago doctrine is less ambitious than the Calvo doctrine, but probably it was more successful. The concept was originally enunciated in an official communique to the Argentinian Ambassador to the United States on December 29, 1902.[630] With the imminent blockade of the Venezuelan coast in mind, Drago attempted to analyse the situation and offer a legal solution to the problem. At the outset of his proposition he excluded from

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[627] (cont'd) "Some Observations on the Calvo Clause", 1933 (27) A.J.I.L. pp.461-468.

[628] Claims Commission: United States and Mexico (1926) 4 R.I.A.A. p.26.

[629] See especially, Drago, L.M. "State Loans and Their Relation to International Policy", 1907 (1) A.J.I.L. p.692. Also Borchard, E.M. The Diplomatic Protection of Citizens Abroad (1922), pp.308-309.

[630] Alvarez, op. cit. pp.187-193. See also later at pp.244-253.

the ambit of his consideration the issue of claims arising from injuries sustained by aliens as a consequence of revolution or internal disorder. Thereby, his proposal was primarily confined to the issue of the forcible collection of public debts. Drago derived this principle in the following passage:

> "Among the fundamental principles of public international law which humanity has consecrated, one of the most precious is that which decrees that all states, whatever be the force at their disposal, are entities in law, perfectly equal one to another, and mutually entitled by virtue thereof to the same consideration and respect."[631]

From this fundamental right, he believed that:

> "(I)t is an inherent qualification of all sovereignty that no proceedings for the execution of a judgment may be instituted or carried out against it."[632]

Although he did concede that a determination by an arbitration tribunal was authoritative and binding upon a sovereign nation, Drago maintained that each individual sovereign inalienably possessed:

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[631] American State Papers, Foreign Relations, 1903, pp.1-5. See also Hershey, op. cit pp.28-30.

[632] In authority for this proposition, Drago quoted Alexander, the prestigious American politician, and former U.S. Secretary of the Treasury, Alexander, as having stated: "...contracts between a nation and private individuals are obligatory according to the conscience of the sovereign and may not be the object of compelling force. They confer no right of action contrary to the sovereign will." American State Papers, Foreign Relations, 1903, p.3.

> "(T)he right to choose the manner and the time of payment, in which it has as much interest as the creditor himself, or more, since its credit and its national honor are involved therein."[633]

Therefore, the more extensive Calvo doctrine can be distinguished from the Drago doctrine which merely sought to prohibit the forcible collection of public debts.

The enunciation of the Drago doctrine was insufficient to prevent the application of coercive interventionary measures by Great Britain, Germany and Italy, against Venezuela. However, after the resolution of this dispute by arbitration procedures and the withdrawal of the combined European naval forces, U.S. President Roosevelt did commend the merits of this proposal. Roosevelt outlined the future policy of the United States towards the collection of such debts. Before the U.S. Senate, Roosevelt declared:

> "Except for arbitrary wrong, done or sanctioned by superior authority, to persons or to vested property rights, the United States government, following its traditional usage in such cases, aims to go no further than the mere use of its good offices, a measure which frequently proves ineffective."[634]

The apogee of the Drago doctrine, and the attempts by Latin American jurists and politicians to limit unrestricted intervention, was attained in the negotiation of the Hague Convention Respecting the Limitation of the Employment of

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[633] Ibid

[634] Moore, Digest, op. cit. Vol. VI, Para. 995, pp.705-717.

Force for the Recovery of Contract Debts, in 1907. Article I of this convention stipulates:

> "The Contracting Parties agree not to have recourse to armed force for the recovery of contractual debts claimed by the Government of one country by the Government of another country as being due to its nationals."[635]

This pact, also designated as the "Porter Convention" after the U.S. Secreatry of State, is simultaneously broader and narrower than the Drago doctrine. It is more extensive in that it encompasses public loans as well as ordinary contractual debts. However it is narrower in that the same article later provides:

> "This undertaking is, however, not applicable where the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, renders a *compromis* impossible, or, after the arbitration, fails to submit to the award."[636]

Thus, the obligation of non-intervention did not apply to the case in which the debtor state refused or neglected to reply to an offer of arbitration, or, after accepting the offer, prevented any *compromis* from being negotiated. Further, this obligation was inapplicable where, after arbitration, the one party refues to honour the ruling.[637]

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[635] Scott, J.B. The Hague Conventions and Declarations of 1899 and 1907 (1915), pp.89-95, at p.89. See also Consolidated Treaty Series, 1907, Vol. 205, pp.250-261.

[636] Scott, ibid, p.89.

[637] Chibambo, op. cit. p.18.

Equally the convention is far narrower than the Calvo doctrine which also prohibited the collection of certain delictual claims, and had attempted to restrict even diplomatic intervention, except under certain stipulated and stringent conditions.[638] Indeed, by the strict nature of the Convention, it appears that this very treaty might even have impliedly recognized the legitimacy of certain forms of intervention to enforce debts, since a number of circumstances continued to exist in which resort to measures of coercion could be had as a means of pressing international claims.

Ultimately, this Convention probably had little effect on the development of international law on this matter. Little seems to have been done to confirm, revise or develop the general rules established by the treaty. Further, although thirty-four states signed the Convention at the Hague, in 1907, of these, only eight deposited instruments of ratification.[639] Although the United States, Great Britain and Russia did ratify the agreement, its effect was negligible, and the Convention itself was effectively superseeded by the League of Nations Covenant and the Pact of Paris.

The long-term value of this history lies in the fact that these events represent the beginning of the process towards the establishment of an inter-American obligation of stringent proportions relating to non-intervention. Within the Pan-American Congress system momentum had already been established which would ultimately create binding conventions of inter-American non-intervention which would render these limited restriction ineffectual.

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[638] See Hershey, A.S. Essentials of International Public Law (1921), pp.329-331.
[639] Consolidated Treaty Series, 1907, Vol. 205, pp.250-263, at pp.262-263.

IX. EARLY TWENTIETH CENTURY EUROPEAN PRACTICE.

The non-intervention norm was affected through two distinct processes and mediums during the two decades between the First and Second World Wars. From the perspective of general international law, non-intervention as a concept of international law did not radically alter in format from the structure which could be identified prior to the First World War, which has already been described.[640] In Europe the consequences of unlimited warfare had become brutally evident in the horrors of the First World War. Naturally, therefore, the Eurocentric system of general international law and organization, which still pervaded during this period, concentrated upon the creation of rules and mechanisms for the avoidance or reoccurrence of another such global confrontation.

On the other hand, the American hemisphere had escaped this hideous ordeal relatively unscathed and unaffected. But the South American subcontinent still exhibited the intention to curtail the continued interference by alien nations, particularly the United States, in their internal domestic affairs. Through the medium of Pan-American conferences and congresses, a momentum had been established to have the principle of absolute non-intervention enshrined as a principle of international law. Since the main protagonist of intervention had become the United States, these states collectively attempted to constrain the violent tendencies of the United States through the processes of Pan-American law, which existed as a particular form of international law.[641]

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[640] See text above, chapter seven.

This diversion of development had emerged as a result of the different perceptions which had developed between these groups. European nations feared the recrudescence of another all-encompassing conflict engulfing the globe and necessarily involving the destruction of European civilization, whilst Central and South American states were naturally conscience of the preponderant imbalance of power between themselves and their northern neighbour, and aware of their lack of cohesion as an entity. The result of this difference of perspectives was that international law and the international community in general, concentrated upon the regulation of "war" in its legal sense[642], whilst simultaneously these Latin American republics attempted to inhibit the phenomenon of "intervention" in the sense of a more limited and restricted, but no less illegal, employment of force. Since these perceptions were so radically at variance an analysis of their separate developments appears appropriate.

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[641] The propensity of Latin American writers to describe the particular form of Inter-American law is a relatively recent phenomenon. However, since 1950 the International Court of Justice has been prepared to acknowledge the possibility of regional systems of international law, which may even supplant or derogate from general customary international law. See the majority decision in the Asylum Case (Columbia v Peru) I.C.J. Reports 1950, p.266. A more progressive attitude was adopted by Judge Alvarez, in dissent, who stated:

> "As far as international law is concerned, the States of America have since their independence, wished to modify that law so as to bring it into harmony with the interests and aspirations of their continent. Pan-American conferences...have proclaimed certain principles as belonging to American international law...This expression...does not mean...an international law which is peculiar to the New World and entirely distinct from universal international law, but rather the complex of principles, conventions, customs, practices, institutions, and doctrines which are peculiar to the Republics of the New World."

I.C.J. Reports 1950, p.266, at pp.293-294. See also Jacobini, H.B. A Study of the Philosophy of International Law as Seen in the Works of Latin American Writers (1954), pp.121-136.

Although the emphasis of the following chapter mainly relates to the legal concept of "war", and the international organizational system, it is important that the developments from this period be fully considered. Not only were aspects of the principle of non-intervention incorporated into specific provisions of the League of Nations Covenant, but also the inability of this organization to inhibit the escalation of international violence from intervention to full scale war was an important factor which promoted the efforts made at San Fransisco to outlaw not only war, but also any use of force, other than in self-defence.

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[642] See also the various Agreements concluded at this time for the purposes of limiting resort to war, or to establish mechanisms of collective defence. Of these, the most important include: The Draft Treaty of Mutual Assistance, 1923 (League of Nations Official Journal, Special Supplement No. 16, 1923); The Geneva Protocol, 1924 (League of Nations Official Journal, Special Supplement, No. 24, 1924); and The Locarno Treaties of 1925 (54 L.N.T.S. pp.354, 360, and 154 L.N.T.S. p.360). See also Brownlie, I. International Law and the Use of Force by States (1963), pp.66-73.

A. THE INTERNATIONAL LEGAL CONCEPT OF "WAR".

The legal concept of war is obviously the most drastic exercise of force within the confines of legality or legal description. Yet prior to the Covenant of the League of Nations, international law acknowledged, and even condoned, the use of force in this manner as an exercise of the sovereign prerogative.[643] As Hall pointed out:

> "International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation."[644]

The repetition of this proposition illustrates the decline of the theory established by classical jurists of the distinction between *bellum iustum* and *bellum iniustum*.[645]

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[643] Stone, J. Legal Controls of International Conflict (1973), pp.297-298. See also Hyde, C.C. International Law (First edition, 1922), Vol. II, Part VII, Title B, Para. 597, p.189; Moore, J.B. Digest of International Law (1905), Vol. VII, pp.153-154; Fauchille, P. Traite de Droit International Public (1921), Tome III, Livre I, Chapter I, Para. 1000, pp.5-7. Commenting on the nature of war, Oppenheim stated:

> "War is not inconsistent with, but a condition regulated by, international law."

Oppenheim, L. International Law (First edition, 1905), Vol. II, Para. 53, pp.55-56.

[644] Hall, W.E. International Law (Eighth edition, edited by A.P. Higgins, 1924), Part I, Chapter III, Para. 16, p.82.

[645] Brierly, J.L. "International Law and Resort to Armed Force", 1930-32 (4) Cambridge Law Journal, pp.308-319, at p.308. See also Phillimore, R. Commentaries Upon International Law (Third edition, 1879), Vol. III, Part IX, Chapter IV, Para. 49, p.77, where he described war as:

> "...the exercise of the international right of action, to which, from the nature of the thing and the absence of any common superior tribunal, nations are compelled to have recourse, in order to assert and vindicate their rights."

Paradoxically, international law had been successful in constructing a regime to regulate the actual conduct of hostilities upon the existence of such a relationship. A substantial code of rules governed the conduct of war and provided for procedures and substantive imperatives relating the laws and customs of war on land and at sea.[646] However, as regards the establishment or creation of the legal relationship of war, international law and international organization remained impotent.

Another irony lay in the existence of rules for the lesser conduct of hostilities in other forms. Intervention as a manifestation of a policy of force was legally determined by a set of customary rules originating in the legal perception of sovereignty. Further, the limited use of force in the form of reprisals was also controlled by an international legal code.[647] However, the rules or limitations established by international law in respect of these phenomena were merely the reflection of the accommodation of international law to the pragmatic realities of international co-existence.

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[646] See *Consolidated Treaty Series*, 1898-1899, Vol. 187, pp.410-461, and 1907, Vol. 205, pp.233-407. These conventions are translated into English from the original French texts in Scott, J.B. *The Hague Conventions and Declarations of 1899 and 1907* (1916). See also Schindler, D. & Toman, J. *The Laws of Armed Conflicts* (1973), pp.1-92, 199-242, 567-655; Roberts, A. & Guelff, R. *Documents on the Laws of War* (1982), pp.35-119; Holland, T.E. *The Laws and Customs of War on Land* (1904).

[647] Reprisals, pacific blockade, and intervention appeared as institutions of customary international law in order to avoid the interpretation of every application of force being construed as an act of war. See Oppenheim, L. *International Law* (First edition, 1905), Vol. II, Chapter II, Section III, Paras 33-43, pp.34-42, and also Hall, op. cit. Part II, Chapter XI, Paras. 120-122, pp.433-443. In the *Naulilaa Case (Portugal v Germany)* 2 R.I.A.A. p.1012, at pp.1025-1028, a Mixed Arbitral Tribunal ruled upon the issue of the legality of reprisals taken by Germany against Portuguese territories in Africa, in 1915.

B. THE MANDATE OF THE LEAGUE OF NATIONS.

The League of Nations was conceived from a number of schemes designed to establish a regime of order amongst its members.[648] The experiences of international conflict, the apparent possibilities of beginning a new era in international history and the desires of statesmen to evolve a system of international co-operation, all contributed to the creation of the organism.[649] The Covenant of the League of Nations perceived of an improved and enlarged concert of powers, an improved system of mediation, conciliation and inquiry, the co-ordination of international decision-making, and the adoption of mechanisms for the mobilization of international opinion against powers resorting to war as a means of settling international disputes.[650]

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[648] See Wilson, F. The Origins of the League Covenant: Documentary History of its Drafting (1928); Hunter Miller, D. The Drafting of the Covenant (1969); Howard-Ellis, C. The Origins, Structure and Working of the League of Nations (1928); and Corbett, P. "What is the League of Nations?", 1924 (V) B.Y.I.L. pp.119-148.

[649] Walters, F.P. A History of the League of Nations (1952), pp.15-39.

[650] The objectives of the League of Nations were outlined in the Preamble to the Covenant which stated:

> "In order to promote international co-operation and to secure international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and horourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among governments, and by the maintenance of justice and a scrupulous respect for

Under the provisions of the Covenant, and Article 10 in particular, each of the member states undertook to "respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."[651] Where such aggression occurred, the Council was empowered to advise upon the means by which the obligations would be enforced. Therefore, in essence, the scheme of sanctions envisaged by the creators of the Covenant was decentralized in that the Council merely advised upon the measures to be adopted, and the individual states reserved the right to determine whether the actual implementation of these proposals would be observed. The legal import of this provision was basically a restatement of the legal obligation to observe the sovereignty of each nation which comprised the international society of that era.

The words "as against external aggressjon" which were employed in this Article are of particular significance to the development of the principle of non-intervention. Since the actions of the League were restricted to the "external" relations of states, then the League was compelled to ignore those aspects of strife which could erupt within the national frontiers of a state. Consequently, the League

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[650](cont'd) all treaty obligations in the dealings of organised peoples with one another, the Powers signatory to the Covenant adopt this constitution of the League of Nations."

[651] Note that all future references to the League of Nations Covenant are to be found in Consolidated Treaty Series, 1919, Vol. 225, p.198. See also United Kingdom Treaty Series, 4 (1919), Cmd. 153.

could not be employed in a manner analogous to which the Holy Alliance had been in earlier times, to suppress national or other movements within the parameters of another member state. The obligations of the League were, therefore, confined to measures against forcible annexation from without the state.

Nor did the League prescribe or recommend any particular form of government, much less guarantee its continued existence. Every member was a sovereign entity, and answerable to the League only for sustaining a government capable of fulfilling its international engagements to the organization.[652]

However, a civil war on a scale which involved the blockade of ports or the interruption of international commerce or relations was a matter which did not remain an issue of merely domestic concern. At the same time, it is doubtful that mere transitory or local disturbances, even if they resulted in the use of considerable military force, could *ipso facto* be a matter of concern to the League. Intervention in civil wars therefore continued to be regulated by the general rules of international law relating to non-interference.

The international obligations of the members did not rest solely upon mutual and reciprocal respect for sovereignty, since it was generally recognized that each nation reserved the sovereign right to resort to war, and that this was not necessarily incompatible with sovereignty.[653] Article 12 made the right to resort to war conditional upon certain criteria, and provided:

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[652] Pollock, F. The League of Nations (1920), pp.127-128.

> "The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council."

This article appeared to impose two conditions upon the right to resort to force. Firstly nations were obliged to seek a peaceful means to a potential confrontation, and secondly, in order to avoid resort to war in periods of high tension, the Covenant imposed a minimum three month period of respite before a nation was entitled to engage in such a conflict. However, the pact did not outlaw resort to war *ipso facto*.[654]

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[653] For an examination of the lack of correlation between doctrine and the facts of international life in this respect, see Corbett, P.E. Law and Society in the Relations of the States (1951), pp.209-237.

[654] To support this paramount obligation the Covenant, in Article 16, sanctioned recourse to war in violation of these undertakings. More specifically, it provided:

> "Should any Member of the League resort to war in disregard of its covenants under Article 12, 13, or 15 it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the

Not only did the Covenant fail to prohibit resort to war, but also it omitted to refer to international coercion in terms of either "force" or "intervention" and certainly did not *ex facie* attempt to curtail the existence of these phenomenon in international relations. The resulting history and practice of the League of Nations aptly illustrate the faults in the established mechanisms in limiting or restricting either force or *de facto* situations of war as a means of achieving political objectives.[655]

It was generally agreed that there existed a general duty not to interfere in the affairs of other states, and this principle of non-intervention was given expression in Article 15, Paragraph 8, of the Covenant.[656] This particular provision stated:

> "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that Party, the Council shall so report, and shall make no recommendation as to its settlement."[657]

As a result of this clause, a general consensus existed

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[654] (cont'd) prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not."

[655] The tragedy of the League was narrated in Bendiner, E. A Time for Angels (1975). The defects of the Covenant were also highlighted in Brierly, J.L. "The Covenant and the Charter", 1946 (XXIII) B.Y.I.L. pp.83-94. See also Luard, E. A History of the United Nations (1977), Vol.1, pp.3-16.

[656] See Castel, J.-G. International Law (Third edition, 1976), p.56.

[657] Emphasis added.

that, at the international level, a state was entitled to exercise exclusive jurisdiction, whenever international law recognized that state as having sole authority to decide the matter. This was to the exclusion of all other states.[658]

In the interpretation of this principle, the Permanent Court of International Justice stated:

> "The words "solely within the domestic jurisdiction" seem...to comptemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by International Law."[659]

However, the domestic jurisdiction clause of the Covenant was restricted in that it only applied to the conciliation jurisdiction of the Council or the Assembly, under Article 15. There was no similar reservation of jurisdiction in regard to arbitration or judicial settlement, and there is no evidence in the *travaux preparatoires* of the Covenant that the issue of reserved jurisdiction was intended to apply in connection with arbitration or judicial settlement under Articles 12-14.[660]

Although Article 10 imposed upon the members an obligation to refrain from aggression against the territorial integrity and political independence of other members, its relationship to Articles 11 to 16 was vague. This Article expressly imposed a legal obligation upon the individual members, but the powers of the Council were not expressly provided to enforce the essence of this provision. And again Article 15, Paragraph 7, was in contradiction to this provision since the former permitted war under certain conditions whilst the latter *ex facie* appeared to prohibit all resort to war except in self-defence.

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[658] Brierly, J.L. "Matters of Domestic Jurisdiction", 1925 (VI) B.Y.I.L. pp.8-19, at p.10.
[659] Tunis and Morocco Nationality Decrees, Advisory Opinion, (1923) P.C.I.J. Reports, Series B, No. 4.
[660] See Waldock, C.H.M. "The Plea of Domestic Jurisdiction Before International Legal Tribunals", 1954 (XXXI) B.Y.I.L. pp.96-142, at p.104.

The various attempts to reconcile these articles were essentially unsatisfactory.[661] In fact, Article 10 was not invoked as a basis for any measures of action adopted by the Council, since its relationship with Articles 11 to 16 was obscure. However, this Article, in association with the General Treaty for the Renunciation of War, 1928, was the basis for the Stimson doctrine of non-recognition, which was founded upon the implied rights stemming from this obligation.[662]

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[661] Brownlie, op. cit. pp.62-65.

[662] See Hackworth, G.H. *Digest of International Law* (1943), Vol. 1, pp.332-334, which quotes the American Secretary of State as having said:

> "The American Government deems it to be its duty to notify both the Imperial Japanese Government and the Government of the Chinese Republic that...it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant and the obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties."

See also McNair, A.D. "The Stimson Doctrine of Non-Recognition", 1933 (XXIV) *B.Y.I.L.* pp.65-74, at pp.67-68 and Fischer Willliams, J. "The New Doctrine of Recognition", 1932 (18) *T.G.S.* pp.109-130, at pp.116-123.

In practice, Article 10 was accepted as nothing more than a general rule or principle, the application of which was provided for in subsequent articles. The violation of Article 10 would automatically result in the simultaneous violation of other articles, some of which provided greater specification than Article 10. If Article 16, for example, did not establish any obligation to proceed to military sanctions, then it is difficult to perceive how sanctions would be mandatory in the case of a violation of Article 10.

However the most unfortunate consequence of the drafting of the Covenant was the multiple adoption of the terms "resort to war", "to go to war", and the continued reference to "war" itself as a legal and technical term.[663] This had the effect of excluding lesser manifestations of force, such as armed intervention, from consideration by the League, which confined itself to the problems arising from the institution of war. Indeed, only in the case of the Italian intervention in Ethiopia did the League Council declare that the undertakings in the Covenant, relating to the use of force, had been violated.[664]

At the inception of the Covenant, war had both a restrictive and subjective meaning, referring not merely to a manifestation of force, but as a technical concept which resulted in the institution of a certain state or condition of affairs. Further, the existence of this "state of war" implied substantial legal consequences and obligations not only to those states directly involved in the confrontation, but also to third parties since this condition produced the collateral status of neutrality for non-belligerents, with all the attendant rights and duties which that status entailed.[665] Therefore, reference to Article 16, Paragraph 1, became restricted to the existence of a *de jure* state of war between two nations, and not merely to the indiscriminate or illegal adoption of measures of force.[666]

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[663] See especially Baty, T. "Abuse of Terms", 1936 (30) A.J.I.L. pp.377-399, at pp.381-399.

[664] League of Nations Official Journal, 1935, pp.1225-1226. See also the Report of the Council under Article 15, Paragraph 4, League of Nations Documents No. C.411(1).M.207(1).

The initiation of this legal relationship evolved either from a declaration of war by one state upon another, or alternatively by the commission of certain acts which were characterized as having been undertaken *animus belligerendi*.[667] A declaration of war, either specifically in that form or in the form of a conditional ultimatum, was not an essential prerequisite required by customary international law, although the state parties to Hague Convention III, of 1907, were obliged by treaty undertakings to issue such a declaration.[668] Given these criteria, a state of war, therefore, would develop when a nation expressly declared a status of war to exist, or where, in the absence of an express declaration, a nation committed acts of force against another, accompanied by indications from which an *animus belligerendi* could be inferred, such as a call to third parties to observe the obligations of neutrality. Further, in the scenario in which a nation committed certain acts of force without exhibiting an *animus belligerendi*, but the state against which the recourse had been taken elected to treat such acts as having produced a condition of war, then the former was still guilty of resorting to war.[669]

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[665] See Martin, C.E. "The Legal Position of War and Neutrality", 1931 P.A.S.I.L. Vol. 25, pp.137-179; Brierly, J.L. "Some Implications of the Pact of Paris", 1929 (X) B.Y.I.L. pp.208-210; and Eagleton, C. "The Attempt to Define War", 1933 (291) International Conciliation, pp.235-287.

[666] A critique of the role of the condition of war in modern international law is given by Lauterpacht, E. in "The Legal Irrelevance of the State of War", 1968 (62) P.A.S.I.L. pp.58-68.

[667] McNair, A.D. The Legal Effects of War (Third edition, 1948), pp.2-10.

[668] Consolidated Treaty Series, 1907, Vol. 205, pp 233-276. See also Scott, op. cit. pp.96-99 and Eagleton, C. "The Form and Function of the Declaration of War", 1938 (32) A.J.I.L.

The relationship between war and lesser manifestations of force, such as intervention, was identified in the following passage:

> "Unilateral acts of force performed by one State against another may be a cause of the outbreak of war, but are not war in themselves, as long as they are not answered by similar hostile acts by the other side, or at least by a declaration of the other side that it considers the particular acts as acts of war. Thus it comes about that acts of force performed by one State against another by way of reprisals or during a pacific blockade in the case

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[668](cont'd) pp.19-36.

[669] See Westlake, J. International Law (1907), Vol. II, Chapter 1, pp.18-26; Moore, J.B. Digest of International Law (1907), Vol. VII, Paras 1106-1108, pp.168-172; and Hall, op. cit. at p.434.

> of an intervention are not necessarily initiative acts of war."[670]

Consequently, acts of intervention undertaken *sine animus belligerendi* did not establish this relationship unless the aggrieved nation wished to interpret these acts as constituting a sufficient pretext.[671]

C. THE LEAGUE OF NATIONS AND LESSER MANIFESTATIONS OF FORCE.

How effective was the League of Nations in regulating armed intervention? The answer to this question is directly dependant upon how the provisions of the Covenant relating to the regulation of force applied to such uses of force as armed intervention. Unfortunately, in the history of the League, it is evident that, since the emphasis of the provisions relating to the use of force mainly applied to "war", in the legal sense of the term, the issue of armed intervention was neglected by the League Covenant.

Certain jurists have attempted to argue, not without merit, that the term "resort to war" in the Covenant incorporated not only the legal relationship of war, but also any recourse to armed force, which would therefore, of course, include armed interventions. This would be tantamount to the assertion that armed intervention *per se* would be illegitimate unless it could be justified by reference to a positive right, such as self-defence. Thus Brierly asserted that, since the main rationale for the introduction of these international safeguards in the Covenant was to protect the interests of third parties, and since the Covenant stipulated that war was a general problem of peace, then the Council, and not individual nations, was entitled to determine that the use of armed force amounted to an act of war, and thereby to apply the sanctions available under the Covenant as it saw fit. This would allow for an extensive interpretation which would not necessarily comply with the term's legal meaning.[672]

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[670] Oppenheim, First edition, op. cit. Vol. II, Para. 55, p.57. See also McNair, A.D. "The Legal Meaning of War and the Relations of War to Reprisals", 1925 (11) T.G.S. pp.29-51, at pp.38-39.

[671] See Castren, E. The Present Law of War and Neutrality (1954), pp.30-40, and also Brierly, J.L. The Law of Nations (Sixth edition by H. Waldock, 1963), pp.259-264.

Fischer Williams similarly alleged that the test for war was conferred by the Covenant upon the members of the League, and that the Council was at liberty to apply an objective test to this question under Article 16, independently of the statements made by the parties to the conflict, and therefore determine the use of armed force to be contrary to the Covenant.[673] However the Council of the League never asserted that such a teleological interpretation was valid, and often agreed that disputes were outwith its authority to invoke the sanctions of Article 16. In restricting itself to *intra vires* action, the Council confined itself to the powers contained in its founding constitution which did not expressly or impliedly infer the adoption of innovative methods of interpretation. Not only would such action have been politically inadvisable, but also its legal foundation would have been dubious, and the subsequent practice of the Council confirms this opinion.

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[672] Brierly, J.L. "International Law and Resort to Armed Force", 1930-34 (4) Cambridge Law Journal, p.308-319, at pp.313-314.

[673] Fischer Williams J. "The Covenant of the League of Nations and War", 1933-35 (5) Cambridge Law Journal, pp.1-21.

Other than the practice of the Council, in the *trauvaux preparetiores* of the drafting of the Covenant, the original intention to adopt the term "armed force" as suggested by the Commission on the League of Nations in its draft of February 11, 1919, was altered to "war" by the final Drafting Committee of the Peace Conference.[674] Since it may be fairly presumed that the drafters of the Covenant were fully cognisant of the disparity between the terms "armed force" and "war", the conclusion is inescapable that these diplomats, politicians and statesmen deliberately intended to restrict the application of Article 16 to the situation of war in its technical sense. The task of reconciling this intention with the interpretations adopted by the above jurists proves to be impossible.

Article 12 did imposes upon the members of the League an obligation to submit for peaceful dispute-resolution "any dispute likely to lead to a rupture", so that the exercise of measures of force would possibly entail a violation of this provision. Although this may have been so, only Article 16 conferred upon the Council authority for sanctions to be applied against nations resorting to war. Consequently, in effect, Article 12 was little more than a hortatory norm, existing without a possibility of enforcement in case of violation. Although lesser measures of force may have amounted to a "rupture" in the relations between two states, by restricting its powers to the existence of a state of war, the League effectively rendered itself enfeebled in this situation.

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[674] Hunter Miller, op cit. Vol. 1, p.212-224, at p.214.

The practice of the League has significant value in the determination of the legal authority and powers of the organization, and the obligations incurred by members under its Covenant. One of the earliest developments in this respect was the events devolving from the Corfu Incident of 1923. Italian General Tellini, President of the Commission for the Delimitation of the Albanian Frontiers, and four members of his entourage were assassinated at Janina, in Greece, by Greek nationals whilst in the performance of their duties. As a result, Italy submitted a petition listing seven grievances, and demanding reparations from the Greek government. However only four of these grievances were admitted by Greece, and as a measure of its dissatisfaction the Italian government ordered the bombardment of Corfu, and the subsequent occupation of the island.[675]

Throughout the whole dispute Italy insisted that the measures adopted were merely of a "temporary character", and that no act of war had been intended.[676] The matter was referred to the Council by Greece, but this issue was evaded, and the eventual resolution of the dispute was derived through the medium of the Conference of Ambassadors.[677]

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[675] See League of Nations Official Journal, 1923, pp.1276-1282, and pp.1283-1285, and also 1924 (V) B.Y.I.L. at p.251.

However, a number of states were dissatisfied with this resolution, and it was proposed that certain questions be referred to a Committee of Jurists for legal interpretation.[678] One of the questions posed enquired as to whether measures of coercion not intended to constitute acts of war were consistent with Articles 12 to 15. In their answer this committee replied:

> "Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures."[679]

Implicit in this reply was that the Council had the power to determine what measures should be adopted as appropriate in the situation, but only when the dispute was submitted to it for consideration. Further, the Committee did not allege that the obligation in Article 12 not to resort to war until three months after an appropriate determination was necessarily violated by the use of "coercive measures", even when those measures involved the application of force.[680] Therefore, impliedly the Committee asserted that the actions of Italy, falling short of war, and possibly capable of being classified as armed intervention, were consistent with Article 12.

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[676] League of Nations Official Journal, 1923, p.1277.
[677] League of Nations Official Journal, 1923, pp.1305-1310.
[678] League of Nations Official Journal, 1923, pp.1349-1352.
[679] League of Nations Official Journal, 1924, pp.523-527.

D. USE OF FORCE AND THE PACT OF PARIS.

Despite the widespread acknowledgment of the limitations imposed upon the Covenant and the League by the restrictive nature of the legal character of war, this term was adopted in the 1928 General Treaty for the Renunciation of War, popularly known as the Kellogg-Briand Pact.[681]

The origins of this agreement lay in a proposal by M. Briand, the French Foreign Minister, addressed to the United States, which suggested France might be receptive to a bilateral agreement expressing the desire to outlaw war between the two countries.[682] In response to the French proposal, U. S. Secretary of State, Kellogg, proposed that such a pact be multilateral as opposed to bilateral.[683] After substantial negotiations, consensus was achieved regarding the content of the agreement, which contains only three articles. Of these, Article 1 provides:

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[680] McNair, loc. cit. p.43.

[681] United Kingdom Treaty Series (1929), no 29, Cmd. 33410; 94 L.N.T.S. p.57.

[682] Foreign Relations of the United States, 1927, Vol. II, pp.611-613.

[683] Foreign Relations of the United States, 1928, Vol. I, pp.3-5.

> "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."[684]

Again the terminology of "war" was adopted in an attempt to establish an international agreement which would contribute to the institution and stabilization of international peace and order.[685]

The use of the term "war" led to similar problems in the interpretation of this Pact as it had earlier in rendering the Covenant moribund. Furthermore, the Pact left the customary right of states to wage war, subject to the obligations of the Covenant, unaffected in several respects.[686] A number of the signatories to the pact indicated that these provisions were inapplicable in the instance of resort to war for the purpose of self-defence. The reservation of the liberty to adopt measures of force in self-defence was not established by the formal reservations by the parties to the treaty, but, rather, the preparatory materials prescribing the views of the parties as to the intention and import of the text state that adhesion to these provisions do not denigrate the right of self-defence.[687]

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[684] To fortify this obligation, Article 2 states: "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

[685] On the interpretation of this Agreement, see Borchard, E.M. "The Multilateral Treaty for the Renunciation of War", 1929 923) A.J.I.L. pp.116-120.

[686] Stone, op. cit. p.300.

Since these notes were not appendixed in any form to the treaty or its instruments of ratification, the Pact was technically accepted without reservation. The value of these statements was in interpreting the intention of the parties, which display considerable unanimity in concluding that self-defence was not incompatible with the treaty.[688] However, the rights reserved were not of an unlimited nature, but rather that the "legitimate" right, or the "sovereign" right, of self-defence was preserved.[689] The consensus of the parties to this treaty conceded that the right of self-defence was so inherent, and universally established, that it was implicit that the convention could not abrogate this right.

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[687] Wright, Q. "The Meaning of the Pact of Paris", 1933 (27) A.J.I.L. pp.39-61, at pp.40-50.

[688] See Borchard, loc. cit. at p.118, where this author stated:

> "Whether the announced conditons upon which alome Great Britain and France were willing to sign the Pact are called "interpretations", "reservations" or "qualifications" or what not, they express as clearly as langauge can express a purpose, intention or understanding, that these countries have signed a treaty on the sole condition that their obligations under the treaty are to be interpreted and understood in the light of the declarations thus officially made and communicated. Whether such a declaration be made in advance of or concurrently with signatures or by reservations on ratification would seem to make no legal difference in the construction of the Pact."

[689] Wright, loc. cit. pp.43-44.

More importantly, the treaty failed to provide machinery for the authoritative determination of a breach of these obligations. Thus, a wide discretion of auto-interpretation was conferred upon each party, which did in fact lead to substantial violation of the Pact in the subsequent practices of states. This was further augmented by the lack of co-ordination between the substantive law of the Pact, and the procedural mechanisms established under the Covenant.

But the critical defect in the agreement remained the reference to the concept of "war" in the legal sense of the term. Under Article 1, the parties condemned and renounced war as an instrument of national policy. As Oppenheim's editor, Lauterpacht, observed:

> "To the extent to which the Paris Pact permits without restriction recourse to measures of force short of war, it is open to the same serious objections was were the corresponding provisions of the Covenant of the League of Nations."[690]

A presumption again must exist that the draftsmen of this Pact, cognisant and fully aware of both the legal situation and of the prior practice in the Council of the League of Nations, deliberately adopted this terminology, and therefore intentionally restricted the obligation to a situation of technical war.

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[690] Oppenheim, L International Law (Seventh edition, edited by H. Lauterpacht, 1952), Vol. II, Para. 52, p.185.

As in the earlier debates respecting the ambit of the prohibition expressly stipulated in the Covenant, legal doctrine again was divided in the interpretation of the Paris Pact. Brierly asserted that the Pact prohibited reort to forcible measures short of war as well as war itself, since Article II provided that settlement of disputes should not be sought other than through the adoption of "pacific means".[691] Thus, the commission of such acts would amount to an attempt to settle a dispute by means other than peaceful procedures.

However, in general, it is difficult to disagree with Bowett, who states that the Pact only prohibited resort to war, for "under the accepted terminology of international law...measures involving the use of force but falling short of war are characterized as "pacific"; in this case Article II cannot be invoked as a reason for departing from the plain meaning of the terms of Article I."[692] However, as Brownlie points out, the most appropriate means of interpreting the Pact will be found by recourse to the subsequent practice of the parties to the convention.[693]

In the history of the League in the field of international political settlement and in the interpretation of the General Treaty of the Renunciation of War, the most significant events possibly were those occurring in the

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[691] Brierly, J.L. The Law of Nations (Second edition, 1935), pp.263.
[692] Bowett, D.W. Self-Defence in International Law (1958), p.136.
[693] Brownlie, op. cit. p.87.

Manchurian provinces of China. Under the pretext of self-defence, Japanese forces captured substantial areas of this province, advancing into the interior of Manchuria.[694] After a period of time, the Japanese government alleged that a spontaneous and indigenous independent movement had evolved, and the state of "Manchukuo" was manufactured.[695] By a Protocol of September 15, 1932, Japan extended recognition to this new state. However, by 1939, only El Salvador, Germany, Italy and Hungary had extended recognition to this entity.[696] Further, on January 28, 1932, Japan launched an military intervention against Shanghai, alleging that anti-Japanese sentiments were threatening to result in the death or injury of Japanese nationals. The Japanese government landed troops in this area under the pretext that this action had been justified to protect Japanese nationals in the face of Chinese neglect to do so.

China brought this matter to the attention of the Council, invoking Article 11 of the Covenant.[697] Although the Council established a Commission to investigate the circumstances of the case, under the supervision of Lord Lytton, the final report of this group was uncertain and non-committal.[698] The Lytton Report did impute the blame for the aggression on Japan, but it merely recommended that negotiations be conducted for the settlement of the issue.[699] The Japanese interventions, both based on pleas of self-defence[700], had not been sanctioned, and had served to illustrate that the rules regarding intervention and non-intervention had not been substantially altered by the Covenant nor the Pact of Paris, in the light of the refusal of the two nations to recognize a *de facto* state of war as a *de jure* state of war.[701]

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[694] See Hyde, C.C. "Legal Aspects of the Japanese Pronouncements in Relation to China", 1934 (28) A.J.I.L. pp.431-443.

[695] See Wright, Q. "Some Legal Aspects of the Far Eastern Situation", 1933 (27) A.J.I.L. pp.509-516.

[696] See Shen, M.O. Japan in Manchuria (1960), pp.297-301.

[697] League of Nations Official Journal, 1931, p.2453. China's motives for evading an application under Article 16 were obvious. Had China acknowledged these as acts of war, Japan would have effectively been granted rights under the laws of war to establish blockades and assert the rights of war against China. Unlimited rights to conduct further military excursions against China would therefore have been granted in exchange for the extremely uncertain protection offered by the League under Article 16.

In the final analysis, certain distinctions should be borne in mind when evaluating the effect of the League upon the enforcement of international obligations. The rights imposed upon states by the Covenant, the Pact of Paris, and international law in general, existed notwithstanding the failure of the League to effectively enforce the letter of the law. The history of this international organization illustrates that, although states may collectively enact broad noble rules of international law, unless there exists a certain element of co-ordination between state practice and these regulations, and unless a certain degree of enforcement accompanies these obligations, then they will lack any element of efficacy, and may face desuetude should they conflict with the perceived vital interests, ambitions or political desires of powerful nations.

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[698] League of Nations Documents, VII.Political, 1932.VII.12.

[699] See Brown, P.M. "The Lytton Report on the Manchurian Crisis", 1933 (27) A.J.I.L. pp.96-100.

[700] See the Observations of the Japanese Government on the Report of the Commission of Enquiry, League of Nations Documents No. C.775.M.366.1932 VII, and also the Chinese Comments on the Observations of the Japanese Government, League of Nations Documents No. A.(Extr.).A.155.1932 VII. On the legal veracity of this claim, see Brown, P.M. "Japanese Interpretation of the Kellogg Pact", 1933 (27) A.J.I.L. pp.100-102.

[701] See Lauterpacht, H. ""Resort to War" and the Interpretation of the Covenant During the Manchurian Dispute", 1934 (28) A.J.I.L. pp.43-60.

Since international law is essentially a product of the wills of the majority of states in international society, by its nature the international legal order attempts to accommodate this factor. Although the Covenant and the Pact of Paris outlawed resort to war, the strength of will in certain states to violate these obligations proved paramount in contrast to the international will to enforce it.

E. NON-INTERVENTION AND THE SPANISH CIVIL WAR.

After the exposure of the inability of the League to deal with premeditated aggression, a general consensus amongst states acknowledged that this organization was inappropriate for dispute resolution.[702] Coupled to the fact that the Spanish civil war was initially a domestic conflict[703] , negligible consideration was given to this issue by the Council. However, this is not to suggest that international law was not relevant in this dispute, but rather, given the facts of the case, its role was minimal. The examination of this case is an illustration of the application of the general principle of non-intervention in civil conflicts. No attempts were seriously made to procure collective action through the medium of the League of Nations, but, rather, a settlement was pursued by collective measures adopted by individual states.

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[702] See Padelford, N.J. International Law and Diplomacy in the Spanish Civil Strife (1937), pp.121-143, which illustrated the rubber-stamping attitude of the League to the actions of individual states. At no time during the Spanish civil conflict did the League consider measures to end the hostilities or alter the natural course of events. See also Walters, op. cit. pp.721-730.

[703] See Article 15(8) of the Covenant.

The Spanish civil conflict arose as a consequence of a conflict of power within the constitutional government; between the clash of the incumbent moderate government, and the extreme right opposition. The extreme right refused to permit the introduction of reforms which sought to establish agrarian reforms, to separate the church from the state, and to democratise the armed forces, and by the sabotage of these reforms centre groups were compelled to support one or other of the political extremes.[704] This polarization of the political spectrum eventually resulted in the victory of the leftist Popular Front and the institution of the proposed reforms.

The opposition groups realized that the balance of political power had swung against them and that only extra-constitutional means and military rule could restore the traditional church-state-army system. Consequently, the Nationalist forces believed that they were struggling against the communist influence in Spain, whilst the governmental supporters believed this to be an ideological struggle against fascist influence.[705]

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[704] See Brenan, G. The Spanish Labyrinth (1943), pp.87-130, pp.215-228, pp.298-315, and pp.316-332; Payne, S.G. The Spanish Revolution (1970), pp.62-184; and Carr, R. The Republic and the Civil War in Spain (1971), pp.16-107.

Although the origins of the conflict were domestic in nature, once actual combat commenced, the civil strife quickly extended into the international arena. The two main fascist powers in Europe, although having abstained from direct participation in the instigation of the conflict, were swift to lend support to the nationalist rebels when requested to do so. Italy dispatched military transports to convey the Spanish army in Africa to the mainland, whilst Germany arranged to supply the rebels with arms and aircraft, as well as a number of technicians and advisers to service the equipment. Once committed, both Germany and Italy continued to lend active support to the nationalists. Indeed, in the later stages of the conflict, both these sides were actively engaged in the conduct of military operations, and the German Condor Legion saw active combat in the conflict.[706]

In August 1936, a collective plan was devised by a number of states in Europe to establish a regime of non-intervention in the Spanish civil conflict. This was principally based upon an exchange of virtually identical notes between the British and French governments on August 15, 1936.[707] These notes referred to the creation of a common international policy towards the Spanish strife, and the preambles to these notes described the revulsion of those governments to the events in Spain, declaring that these countries had decided to abstain from any possible acts of intervention. The Declaration by the British government provided:

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[705] See Padelford, N.J. "International Law and the Spanish Civil War", 1937 (31) A.J.I.L. pp.226-243.

[706] See Coverdale, J.F. Italian Intervention in the Spanish Civil War (1975), pp.3-30 and Thomas, A.V.W. & Thomas, A.J. "International Aspects of the Civil War in Spain, 1936-1939", in Falk, R.A. The International Law of Civil War (1971), pp.111-178, at pp.111-120.

> "The Government of His Majesty, in so far as it is concerned, prohibits the direct or indirect exportation, re-exportation and transit, to a destination in Spain...of all arms, munitions and materials of war, as well as aircraft, assembled or dismantled, and all vessels of war, such as are enumerated in the appended Order in Council of 1931."[708]

These measures were to take effect immediately, and would necessarily entail the frustration of existing contractual obligations.[709]

However, both the British and the French declarations were contingent upon similar undertakings being made by both Germany and Italy. Germany consented to sign three articles of the Agreement, but omitted to adhere to the preamble which left it free to engage in all forms of intervention not specifically prohibited. However, Germany subsequently clearly violated these obligations on a number of occasions.[710] Italy also signed this agreement, but also refused to acknowledge the import of the preamble, and, further, proceeded to stipulate that the agreement would be considered void in the absence of a commission to supervise it. Within two weeks of signing the pact, Italian warships were assisting nationalist forces in defending the Mediterranean island of Majorca and in capturing the neighbouring island of Ibiza.

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[707] See Padelford, N.J. "The Non-Intervention Agreement and the Spanish Civil War", 1937 (31) A.J.I.L. pp.578-603.

[708] This undertaking was incorporated into British law by the Arms Export Prohibition Order in Council, Statutory Rules and Orders, 1931, No. 413, and the Merchant Shipping (Carriage of Munitions to Spain) Act 1936, 1 Edw. 8, Chp. 1. See generally, Padelford, op. cit. pp.53-120.

[709] See McNair, A.D. The Legal Effects of War (Third edition, 1948), pp.133-169.

The United States was not invited to participate in this scheme but in that power a neutrality statute was enacted on August 11, 1936, which provided that no belligerent could procure arms or munitions within the United States unless shipments were paid in cash and transported by vessels of non-American registry.[711] Further, on January 8, 1937, the U.S. Congress enacted another resolution which prohibited the exportation of weapons and munitions to either of the opposing forces in the Spanish civil strife.[712] This Act made it unlawful, during the existence of the state of civil strife in Spain "to export materials of war to Spain or to any country for transshipment to Spain for the use of either of the opposing forces in Spain."

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[710] See Thomas, H. "The Spanish Civil War", in Luard, E. The International Regulation of Civil Wars (1972), pp.26-36, at pp.28-33 and Proctor, R.L. Hitler's Luftwaffe in the Spanish Civil War (1983).

[711] United States Statutes at Large, 1935-1936, Vol. 49, Part I, pp.1081-1085.

[712] United States Statutes at Large, 1937, Vol. 50, Part I, pp.3-4. See also Falcott, M. & Pike, F.B. The Spanish Civil War, 1936-1939, pp.1-48.

In contrast, the Soviet Union had immediately recognized the instability of the incumbent Spanish government, and authorized the Comintern to organize international brigades of volunteers in several countries to fight in support of the government.[713] However, eventually the Soviet Union also agreed to adhere to the non-intervention system, and on August 23, 1936, the Soviet government issued a similar declaration to those made earlier by Great Britain and France.

The Spanish government adamantly protested this action. Fully aware of the continued supply of weapons and ammunition to the rebel forces by Germany and Italy, the Spanish *de jure* government pleaded for the repeal of this international arrangement. In its appeal, the government drew attention to the imbalance which this embargo would create, and that fact that this treatment would set an unfortunate precedent in the international order.[714] However, these protests went unheard, and the democratic nations of Europe instituted the non-intervention scheme, whilst Germany and Italian directly assisted in the overthrow of the the Spanish constitutional government.

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[713] See Carr, E.H. The Comintern and the Spanish Civil War (1984) and also Cattel, D.T. Soviet Diplomacy and the Spanish Civil War (1957), pp.32-52.

[714] Padelford, op. cit. pp.231-232.

From the perspective of the non-intervention principle the lesson of the Spanish civil war was particularly intense. Considered from a legal position, the obligations of states involved in this civil conflict were quite clear. So far as international law was concerned, internal revolution was not a violation of any international obligations.[715] Indeed, the international community has a duty to refrain from interfering with a sovereign state's internal constitution.[716] Given the existence of this duty, McNair observed that:

> "(T)he guiding principle of the conduct of Foreign States towards their unhappy neighbour suffering from civil strife is merely the continuance of the normal duty of non-interference in the domestic affairs of another State."[717]

McNair not only identified an obligation to desist in assisting the rebel forces in fighting the incumbent government, but also questioned the existence of any obligation on the part of one state to assist another in the suppression of internal revolt. Further, a certain degree of authority existed to substantiate the proposition that assistance to the government to subdue such revolt may in itself be illegitimate.[718]

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[715] See text above, p.205.

[716] McNair, A. "The Law Relating to the Civil War in Spain", 1937 (53) L.Q.R. pp.471-500. See also Padelford, A.J. "International Law and the Spanish Civil War", 1937 (31) A.J.I.L. pp.226-242.

[717] McNair, ibid, p.472.

[718] See Baty, T. Canons of International Law (1930), pp.99-102.

However, most probably representing the correct position in this matter, Garner stated:

> "There is no rule of international law which forbids the government of one state from rendering assistance to the established legitimate government of another state with a view to enabling it to suppress an insurrection against its authority."[719]

Although international law was somewhat indefinite on the subject of whether or not one state could lend assistance to an incumbent government in periods of rebellion, a clear legal obligation existed prohibiting assistance to the rebel forces. This was strictly forbidden and even the creation of a status of insurgency could not affect the rights of the government since the *de jure* government was the only lawful government recognized by international law.[720]

The stage after insurgency was the recognition of belligerency, the minimum requirement for which was accepted to be:

> "(T)he existence of a civil war accompanied by a state of general hostilities; occupation and a measure of orderly administration of a substantial part of the territory by the insurgents; observance

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[719] Garner, W. "Questions of International Law in the Spanish Civil Strife", 1937 (31) A.J.I.L. pp.66-73, at p.68.

[720] See Scott, J.B. Resolutions of the Institute of International Law (1916), p.157 and McNair, A. D. The Legal Effects of War (Third edition, 1948), pp.30-32. Insurgency was the condition in a civil conflict between unorganized and spasmodic civil disorder, and the conduct of an organized and continuing civil war between two identifiable contending parties within a state.

> of the rules of warfare on the part of the insurgent forces acting under the command of some responsible and ascertainable authority; [and] the practical necessity for third States to define their attitude to the civil war."[721]

The recognition of a state of belligerency in a civil conflict amounted to the acknowledgment of a full scale internal war within a state.[722]

Where such conditions prevailed, the relationship between the forces in the state and the outside world was, for the purposes of the conflict, identical to a condition of war existing between two independent and sovereign states.[723] The recognition of this status automatically invoked the corpus of the laws of neutrality, and inferred an obligation of non-intervention and neutrality on the part of non-belligerents.[724]

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[721] Oppenheim, L. International Law (Seventh edition, by Lauterpacht, 1952), Vol. II, Para. 76, p.249. See also Article 8 of the Institute of International Law, Resolutions on the Subject of Insurrection, in Scott, op. cit. p.159; Moore, J.B. Digest of International Law (1907), Vol. I, Paras 59-70, pp.164-205, and Farer, T.J. "The Regulation of Foreign Intervention in Civil Armed Conflict", 1974 (142) Hague Recueil pp.297-404, at pp.318-330.

[722] Note the following comments made by Garner, J.W. in "Recognition of Belligerency", 1938 (32) A.J.I.L. pp.106-113, where this author stated:

> "Recognition of belligerency is nothing more than recognition of the fact of the existence of a war. It does not involve the recognition of any government or political regime. Recognition is a matter entirely within the discretion of foreign states in the sense that they are free to judge for themselves whether the struggle has attained the proportions of war and, if so, whether they can recognize it as such without impairing their own rights or prejudicing the general interests of the community of states."

[723] McNair, loc. cit. pp.122-123.

During both the stages of rebellion and insurgency international law acknowledged that the Spanish government was entitled under international law to preferred treatment by third parties, which would include the right to purchase munitions from other states. But, by the same token, international law did not confer upon any other nation the obligation to have to sell weapons. This right was discretionary insofar as international law permitted the sale, but did not compel the vendor or supplier to sell or supply.

The legality of the Non-Intervention Pact itself thereby becomes questionable.[725] Although the parties to the Pact were entitled unilaterally to suspend the supply of munitions, by collectively agreeing to withhold such transfers, these nations were, in effect, attempting to supplant the rights of the Spanish government to solicit war materials in the international market.[726] This was tantamount to indirect intervention in that, by this action, the rebel forces, which were not yet entitled to belligerent rights, were placed on the same footing as the lawful government, and were endowed with the benefits of support from the fascist fraternity. This resulted in the denial of the *de jure* government's rights to preferential treatment to subdue the insurgency.

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[724] Scott, op. cit. Article 7, p.158.

[725] See Smith, H.A. "Some Problems of the Spanish Civil War", 1937 (XVII) B.Y.I.L. p.26, where the author argued that the non-intervention agreement was itself equivalent to a collective declaration of neutrality. Since it did not recognize the existence of a state of war, it was singularly misnamed, and also constituted an unfriendly act towards that state by all those parties concerned.

[726] Thomas & Thomas, op. cit. pp.143-146.

Had the Non-Intervention Agreement been pre-conditioned by the recognition of a state of belligerency between the parties, then the act would have been a lawful exercise of the collective rights of neutrals. However, all the governments adhering to the Non-Intervention Accord in fact denied that this Agreement implied the recognition of belligerency, and, since the Pact was drawn up merely two weeks into the conflict, this is indeed a reasonable implication.[727] Commenting on the Pact, Lauterpacht noted that:

> "Inasmuch as Italy and Germany undertook not to supply the rebellious forces with munitions of war, these agreements consisted in an undertaking on the part of certain powers to refrain from committing an international illegality in consideration of the promise of other powers to refrain from action in a manner in which they were entitled - and according to some, legally bound - to act."[728]

By witholding these legal rights, the democratic parties to the Agreement had entered on the path leading to the policy of appeasement in their relations with the fascist states in Europe.

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[727] Little, D. Malevolent Neutrality (1985), pp.221-265.
[728] Oppenheim, op. cit. Vol. I, Para. 135, p.306.

Whether or not, from the perspective of international political history, this affair was inevitable, it does not alter the fact that international law had little normative effect on the ideologically motivated fascist states. In the face of the unwillingness of Great Britain, France and the United States to assist Spain, these nations assisted in procuring a fascist victory in Spain. Ultimately the majority of nations in Europe were to pay the price for their failure to resolve this issue effectively. The existence of the imbalance of military power in favour of the fascist states ultimately led to the avoidance and non-adherence of international legal obligations, and the lessons of this episode remain as pertinent to-day.

X. THE CODIFICATION OF NON-INTERVENTION IN PAN-AMERICAN INTERNATIONAL LAW.

By its nature, particular, local or regional international law is applicable to groups of nations, according to the existence of certain peculiar geographic, historical, ethnical or political values or circumstances which have led to these states to collectively adopt a particular legal perspective upon a specific legal subject.[729] These norms form a subsection of the international legal order, and are capable of evolving through both treaty and customary norm-creation processes. Further, since the interpretative principles of international law provide for the application of the maxim *lex specialis derogat legi generali*, then it is possible to adopt rules at variance with the international community, but which may be construed as paramount obligations.[730]

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[729] Local or regional systems of international law develop predominantly through the mechanisms of customary practice. In The Asylum Case (Columbia v Peru), I.C.J. Reports (1950), at p.266, the International Court conceded the possibility of the existence of American international law in general, although in the particular case insufficient evidence was adduced to support the particular local custom. See also Wolfke, K. Custom in Present International Law (1964), pp.89-92. However, see Lauterpacht, H. "The So-Called Anglo-American and Continental Schools of Thought in International Law", 1931 (XII) B.Y.I.L. pp.31-62. Along similar lines, certain Soviet writers have asserted the existence of "socialist international law", which is that set of principles applicable to those Eastern bloc states which profess the principles of socialist internationalism. See Tunkin, G.I. Theory of International Law (Translated by W.E. Butler, 1974), at p.44, and Tunkin, G.I. "International Law in the International System" 1975 (147) Hague Receuil pp.1-215, at pp.106-110. Also, see Vincent, R.J. Non-Intervention and International Order (1974), pp.175-179, for a description of the "Brehznev Doctrine" which is reproduced in 1968 (7) I.L.M. at p.1323.

One such illustration of this sub-systematic model is the nature of the Pan-American international society which has, to a certain degree, incorporated norms of international legal co-existence which deviate from general international law. In fact, the paramount example of this process relates to the evolution of the principle of non-intervention, which has developed through processes independently of the general obligation. This result has been achieved because of the historical evolution of the American hemisphere, and in particular, in reaction and revulsion to the continual violation of the sovereignty of Latin American states, initially by European states, and subsequently by the United States.[731]

The immense comparative growth of the United States, in both economic and political influence, as observed earlier[732], led to the capability of that nation to impose its will as it saw fit, subject only to the vague limitations established by international law which, in effect, the Monroe Doctrine had attempted to mitigate. Although American expansionism in the late nineteenth and early twentieth centuries was not exclusively restricted to the American continental vicinity, it was in Central and

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[730] See Rights of Passage Case, I.C.J. Reports, 1969, at p.39 and also Villiger, M.E. Customary International Law and Treaties (1985), pp.33-36.

[731] Thomas, A.V.W. & Thomas, A.J. Non-Intervention (1956), pp.55-56.

[732] See text, above, pp.241-258.

South America, and the Carribean region, that manifestations of American military might were initially exercised.[733] Not only was this nation sufficiently powerful to coerce European states into refraining from territorial ambitions in this hemisphere, but also sufficient military hegemony was exercised over Latin American states to create an American sphere of influence in this region[734] , which was the ultimate construction of the Monroe Doctrine.[735]

Associated with this recently acquired influence and vigour, the United States no longer needed to maintain that the non-interference principle of the Monroe doctrine was strictly applicable between itself and the sovereign states of Latin America. With the renunciation of European colonial designs on the continent, the United States could waive the principle of non-interference as a principle applicable between itself and Central and South America and the micro-states of the Carribean. In the early twentieth century, a policy of actively interposing in disputes within or between Latin American states was adopted, in order to facilitate the extension of economic social and political order and discipline throughout the area.

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[733] As a result of the settlement of the Spanish-American War, the United States acquired substantial influence in Puerto Rico, and the Phillipines were effectively annexed by the Treaty of Paris of December 1898, which is reproduced in the Consolidated Treaty Series, 1898-1899, Vol. 187, pp.100-105. The United States also initiated a series of discusions aimed at increasing U.S. influence and access to foreign markets, including the "open door" policy towards China. The economic basis of this expansionism is described by Conant, C.A. "The American Economic Basis of Imperialism"; 1898 (164) North American Review, pp.326-340.

[734] See Kane, W.E. "American Involvement in Latin American Civil Strife", 1967 (6) P.A.S.I.L. pp.50-69, where the author comments that, in the decade following the Spanish-American war, armed intervention became the express policy of the U.S. government. During those years, the United States slowly created a regime of incontestable control over the Caribbean area by means of a system of protectorates, in the affairs of which the United States believed itself to be entitled to interfere.

[735] See Vincent, op. cit. pp.102-141. For an illustration of the development of the Monroe Doctrine from the American perspective see Hyde, C.C. International Law Chiefly As Interpreted and Applied by the United States (Second edition, 1945), Vol. 1, pp.281-318.

In this respect, the statement of Secretary of State, Olney, made in the context of the Venezuelan Boundary Dispute in 1895, has almost prophetic significance. In this connection it was stated:

> "To-day the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition. Why? It is not simply because of pure friendship or goodwill felt for it...It is because, in addition to all other grounds, its infinite resources combined with its isolated position render it master of the situation and practically invulnerable as against any or all other powers."[736]

The significance of this opinion, and the articulation of these sentiments, lies in the fact that it marked the departure from the passive premises of the original Monroe doctrine, towards the virtually arbitrary execution of military coercion against nations which, theoretically, in terms of international law, had attained their independence.

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[736] Moore, J.B. Digest of International Law (1906), Vol. VI, Para. 966, p.533.

From this point onwards, intervention would be manifested on all occasions in which the United States perceived its political, financial or strategic interests to be compromised or threatened.[737]

The most conspicuous manifestation of this extensive interpretation of North American foreign policy was the adoption of the so-called "big stick" attitude of President Roosevelt. Under this doctrine, the recent events of the collective European intervention against Venezuela in 1902, were unacceptable. In order to circumvent future European intervention, Roosevelt declared in his fourth annual message to Congress on December 6, 1904, that:

> "Chronic wrongdoing, or any impotence which results in the general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the western hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power."[738]

In this construction of foreign policy, the Monroe statement, which certainly had originally been characterized as a defence against interventionism, was transformed into a doctrine of intervention. According to this statement of policy, the United States would arbitrarily intervene in instances in which its interests were subjectively determined to be compromised. Although the threat of European interference had been effectively erradicated, this had been substituted by the spectre of American intervention in situations in which Latin American states found themselves unable to uphold or honour international obligations.

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[737] See Kane, op. cit. pp.52-95.

[738] Richardson, J.D. Messages and Papers of the Presidents (1917), Vol. X, pp.831-832.

The first instance of American interventionism had been manifested when civil strife erupted in Cuba against the Spanish colonial administration.[739] On April 20, 1898, the United States recognized the independence of Cuba, and deployed the U.S. navy in blockade of the coast to assist the rebels.[740] This interference in the colonial affairs of Spain ultimately led to the Spanish-American War.[741] Upon the successful eviction of the Spanish authorities from the island, the United States recognized the *de jure* nature of that entity within the international society.[742]

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[739] For an account of the events in Cuba at this time, see Thomas & Thomas, op. cit. pp.21-28, and Kane, op. cit. pp.43-51.

[740] See Martin, C.E. The Policy of the United States As regards Intervention (1921), pp.149-161.

[741] See Taylor, H. A Treatise on International Public Law (1901), Part III, Chapter VI, Paras 416-419, pp.419-422.

[742] The legal status of Cuba at this time was subject to a variety of legal interpretations. Hyde, op. cit. Vol 1, Para. 19, pp.27-29 suggested that Cuba merely accepted the protection of the United States under the Platt Amendment, and therefore remained a sovereign state. In Lawrence, Principles of International Law (Seventh edition, 1923) at p.67, the author suggested that Cuba became a "client state". In Hershey, A.S. Essentials of International Public Law and Organization (1921), at p.108, the proposition was advanced that Cuba became a "protectorate" of the United States. Other writers, including Fenwick, C.G. in

At the settlement of the Spanish-American War by the Treaty of Paris, on December 10, 1898, the international status of Cuba remained undetermined.[743] The U.S. Secretary of War, Root, declared that the United States would not relinquish control over Cuba in the absence of sufficient guarantees that Cuba would remain stable. Consequently, the Cuban provisional government was forced to consent to the Platt Amendment, which was an annexed provision of an army Appropriate Act.[744] The operative clause of this statute provided:

> "The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States..."

This provision was made the basis of an international obligation by the conclusion of a bilateral treaty in 1903, between Cuba and the United States.[745]

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[742](cont'd) International Law (Third edition, 1948), at pp.111-112, maintain that Cuba remained a sovereign state despite these actions.

[743] Consolidated Treaty Series, 1898-1899, Vol. 187, pp.100-105.

[744] United States Statutes at Large, Vol. XXXI, 1899-1901, pp.897-898.

[745] Consolidated Treaty Series, 1903, Vol 193, pp.198-201. Oppenheim, in International Law (Eighth edition, 1955), Vol. I, Para. 136, p.307, expressed the opinion that this provision, and its incorporation into treaty, legitimated the subsequent American intervention of 1906. See also Lawrence, T.J. Principles of International Law (Seventh edition, 1923), p.123.

Another cardinal aim of American foreign policy was the construction of a transoceanic canal in Central America.[746] The most suitable geographical location of an Isthmian sea passage was in the Panama district of the Republic of Colombia, but Colombia was reluctant to enter into an agreement which would effectively renounce its sovereignty over an area of its territory. However, indigineous revolution was fomenting in the Panama province of Colombia and, by October of 1903, it was clear that the Colombian government no longer exercised effective control over this region.

Under the pretext of treaty rights, and the exercise of the right to protect American nationals, the United States navy prevented the landing of governmental troops to suppress the revolution, and American forces bombarded government held areas in the region.[747] Despite the chaotic nature of the provisional government, on November 6, 1903, the United States recognized the Republic of Panama.[748] The American government argued that these actions were legitimate under Article XXXV, Paragraph 1, of the Treaty of December 12, 1846, between the United States and New Grenada, the predecessor of Colombia, which obligated the United States to guarantee the neutrality of the Isthmus, and also to prevent the commission of any warlike acts in the region by whomsoever.[749] However, by the very same article, the United States had guaranteed the sovereignty of that state, and by succession, of Colombia, over this region.[750] It appears incontrovertible that the American action on this occasion was premeditated, and was not without ulterior motives.

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[746] In 1850, the United States had agreed, in the Clayton-Bulwer Treaty, to jointly undertake the construction and administration of a transoceanic canal in this region (Consolidated Treaty Series, 1850, Vol. 104 pp.41-47). This treaty was renegotiated in the Hay-Paunceforth Treaty of November 18, 1901, which conferred exclusive rights of construction upon the United States. See, Consolidated Treaty Series, 1901-1902, Vol. 190, pp.215-217. This instrument symbolized British recognition that the Carribean basin had become an American sphere of influence.

[747] See Martin, op. cit. pp.162-173.

[748] Moore, Digest, op. cit. Vol. III, Para. 344, pp.46-56. Hershey, op. cit, at p.153, suggests that this premature recognition by the United States constitued a "disguised intervention by President Roosevelt in the interests of collective civilization and of the United States."

One of the first executive actions of the new Panamanian government was the conclusion of an agreement between this new republic and the United States on November 18, 1903. Under the terms of the Convention for the Construction of a Ship Canal, 1903, Panama conferred certain rights of intervention upon the United States. Article XIII of this Agreement provided:

> "If it should become necessary at any time to employ armed forces for the safety or protection of the Canal, or of the ships that make use of the same... the United States shall have the right, at all times

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[749] Treaty of Peace, Amity, Navigation and Commerce, Consolidated Treaty Series, 1846-1847, Vol. 100, pp.363-392.

[750] Article XXXV, Paragraph 4, stated:

> "[T]he United States guarantee [sic] positively and efficaciously to New Granada...the perfect neutrality of the before mentioned Isthmus...and, in consequence, the United States also guarantee [sic], in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory."

and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes."[751]

The same administration acted in a similarly arbitrary fashion when presented with the insurrection and civil disturbances in the Dominican Republic in 1907. American concern for the maintenance of order in this strategic location was evident in the light of the political chaos which pervaded throughout this state, and at the inability of the incumbent government to honour its financial obligations. Faced with the precedent established by the European intervention in Venezuela in 1902, the American government effectively imposed international receivership upon the island by the imposition of military order within that state.[752]

This intervention was occasioned by the possibility of European intervention into an area which, by its proximity to the Panama Canal zone, was construed as a threat to the vital interests of the United States. By these actions, the United States showed itself willing to adopt the mantle of international debt collector in the Americas. Obviously, this was not conducive to Pan-American relations. This policy signaled the initiation of a general policy of pre-emptive intervention to circumvent plausible European interference in the hemisphere.

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[751] Consolidated Treaty Series, 1903-1904, Vol. 194, pp.263-272. On the present legal status of Panamanian-United States relations, see Furlong, W.L. & Scranton, M.E. The President, the Congress and the Panama Canal Treaties (1984).

[752] See Treaty of February 8, 1907, for the Assistance of the United States in the Collection and Application of the Customs Revenues of the Dominican Republic, Consolidated Treaty Series, 1906-1907, Vol. 203, pp.351-353. See also Hyde, op. cit. Vol. 1, pp.70-71.

Under the same justification, the United States intervened by military imposition in Haiti in order to forestall the possibility of the state falling under the influence of a European power such as Great Britain, France or Germany, which was construed as a real, but indirect, threat to the Panama Canal zone.[753] After the occupation of Haiti, the United States compelled the incumbent government to sign the Treaty of September 16, 1915[754] , which was subsequently ratified by the Haitian Senate. The import of this agreement was to place Haiti in a legal situation of political and financial tutelage, in a similar manner as the Dominican Republic had been earlier.[755] This agreement provided for American administration of Haitian customs and financial affairs, the organization of the state police, a ceiling on the national debt, a prohibition on possible surrender of territory to foreign nations, all of which was supported by the proviso that the United States was entitled to intervene when necessary for the preservation of order and the maintenance of an adequate system to ensure the protection of life, property and liberty.[756] American troops were not withdrawn from the island until 1934, and not until 1941 were the financial constraints removed.[757]

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[753] Hackworth, Digest of International Law (1940-1944), Vol. I, pp.152-56.

[754] Treaty between Haiti and the United States Regarding the Finances, Economic Development and Tranquility of Haiti, of September 16, 1915 in Consolidated Treaty Series, 1915-1916, Vol. 221, pp.144-149 See also Finch, F.A. "The Treaty between the United States and Haiti of September 16, 1915", 1916 (10) A.J.I.L. pp.859-865.

[755] Hyde, op. cit. Vol. 1, pp.75-77.

A similar relationship was effectively established between the United States and Nicaragua in 1910. Sensitive to civil unrest in the Central American region, the United States intervened by assisting the revolutionary forces to overthrow an unpopular incumbent government. Again a catalogue of legitimate pretexts for intervention was enumerated which ostensibly alleged that the intervention was undertaken to protect American personnel, property and interests.[758] However, it was obvious that the United States government desired to assist in the overthrow of the incumbent regime which had appeared to compromise the security of central America by fomenting unrest in the area.

In keeping with the pattern already firmly established, in 1911 the United States and the *de novo* Nicaraguan government agreed to the Knox-Castrillo Treaty of 1911.[759] This agreement granted certain rights to the United States, including the management of Nicaraguan customs houses, and the re-financing of outstanding international obligations. Although this treaty was not ratified by the U.S. Senate, it was honoured by both parties.

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[756] See Hyde, op. cit. Vol. 1, Secs 22, 22a, 82a, pp.75-80, 261-264.

[757] U.S. Executive Agreement Series, Nos 46 and 183.

[758] Hackworth, Digest, op. cit. Vol. II, Para. 154, at pp.328, 331.

[759] 1911 (5) A.J.I.L. Supplement p.291. See also Right to Protect Citizens in Foreign Countries by Landing Forces, Memorandum of the Solicitor for the Department of State, pp. 75-77.

Through this network of international conventions, the United States successfully constructed an order under which intervention could be claimed to be legitimate, since treaties had been concluded to confer such rights. However, this assemblage of agreements did not preclude American intervention into states with which no such agreements had been concluded.[760] By the device of interventionism, the United States had succeeded in establishing its unquestioned dominance in the Central American and Carribean areas, and the foundation for the political concept of spheres of influence had been established.

The international repercussions of these exercises of interventionism were not only the continued reassertion of the principles espoused by Calvo and Drago[761] , but also the manifestation of a movement towards the positive affirmation and codification of the principle of non-intervention in Pan-American international legal relations. To achieve this objective, the jurists of Latin America made substantial and effective use of the Inter-American organizational structure.

At the Second International Conference of American States, in 1902, a proposal was made for the codification of that corpus of international law which had particular and significant implications for Inter-American relations.[762] A Convention was signed which embodied a consensus that an attempt should be undertaken to formulate codes on both public and private international law. Although this convention was not ratified, it embodied momentum towards this objective, and at the Third International Conference held at Rio de Janeiro, in 1906, it was agreed by convention to establish an International Commission of Jurists, composed of one representative from each signatory state.[763] The mandate of this group was to prepare tentative draft codes on the particular rules of private and public international law pertaining to Inter-American relations.

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[760] For example, see the catalogue of interventionary acts undertaken in the course of U.S.-Mexican relations, and listed in Thomas & Thomas, op. cit. pp 45-51.
[761] See text below, pp.258-270.

At a meeting in 1912, again at Rio de Janeiro, this Commission met for the first time, and organized itself into a number of committees to study and comment on the problem of codification. The Third Committee was designated in charge of the draft principle applicable to peaceful Pan-American relations. After the enlargement of this Commission, and its subsidiary committees in 1925[764], the Pan-American Union requested the American Institute of International Law to present proposals to the Commission of Jurists for consideration. When complete, the principle of non-intervention was stated in Article 14 of Project Six, in the following terms:

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[762] See Scott, J.B. The International Conferences of American States, 1889-1928 (1931), pp.69-70.
[763] Scott, ibid, pp.144-146.
[764] Scott, ibid, pp.245-246.

> "No state has the right to intervene in the internal or external affairs of an American Republic against the will of that Republic. Apart from treaties from which there is derived such a right, the only lawful intervention is friendly and conciliatory action without any character of coercion."[765]

After limited reformulation, these proposals were transferred to a meeting of the Pan-American Union for consideration. This organization distributed these proposals amongst the various parties for consideration, the suggestions from which were presented to a session of the Commission of Jurists in 1927.[766] The results of this procedure were that the principle was construed in even more rigid terms, and the exception to non-intervention in the case of an appropriate treaty was removed. However, it is possible that the term "against the will" implies that intervention is possible with the consent of the state, which could be manifested by the agreement of a convention which conferred rights of intervention to another state.

At the meeting of the Commission of Jurists, this proposal was reduced to the statement that:

> "No state has a right to interfere in the internal affairs of another."[767]

The tendency towards the tighter construction of the obligation of non-intervention is self-evident. However, it is similarly obvious that such an obligation would remain subject to the reservation of self-defense.

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[765] Thomas & Thomas, op. cit. p.59.
[766] See Thomas & Thomas, op. cit. p.59.
[767] See Scott, J.B. "The Gradual and Progressive Codification of International Law", 1927 (21) A.J.I.L. p.417.

Due to strong American opposition, this principle was not adopted at the Sixth International Conference of American States, held in Havana, in 1928. The U.S. Secretary of State adamantly defended the right of a state to intervene to protect nationals, asserting:

> "Now it is a principle of international law that in case (of internal disorder) a government is fully justified in taking action - I would call it interposition of a temporary character - for the purpose of protecting the lives and property of its nationals. I would say that it does not constitute an intervention..."[768]

It is difficult to construe North American actions regarding the states of Central America and the Carribean as anything other than intervention, particularly in regard to the fact that, ultimately, the United States was successful in imposing its will upon its victims, and not only for a temporary period. However, vigorous North American opposition to this principle was maintained.

With the introduction of a progressive new administration in the United States, President Roosevelt had prescribed future American foreign policy to be regulated by the principle that:

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[768] Hyde, op. cit. Vol. 1, Part II, Para. 72A, pp.251-252. See also Vries, H.P. & Rodriguez-Novas, J. The Law of the Americas (1965), pp.17-18.

> "In the field of world policy, I would dedicate this nation to the policy of good neighbour - the neighbour who resolutely respects himself and, because he does so, respects the rights of others - the neighbour who respects his obligations and respects the sanctity of his agreements in and with a world of neighbours."[769]

Under this new guidance, at the Seventh International Conference, held in Montevideo in 1933, the U.S. delegation reversed their former negotiating position. In the Convention on Rights and Duties of States, Article 8, as adopted, provides:

> "...no State has the right to intervene in the internal or external affairs of another."[770]

However, at the signature of this convention, the United States annexed a reservation to these obligations, and reserved its rights as conferred under "the law of nations as generally recognized."[771] The effect of this was to subject the principle of absolute non-intervention to the exceptions provided by general international law. In effect, therefore, from the perspective of the United States towards the signatories, the applicable regime of non-intervention was no more rigourous than that which existed at the level of general international law.[772]

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[769] Rosenman, S.I. The Public Papers and Addresses of Franklin D. Roosevelt (1938), Vol. II, p.14. See also Wood, B. The Making of the Good Neighbour Policy (1961), pp.118-135.

[770] 165 L.N.T.S. p.19, at p.25.

[771] 165 L.N.T.S. p.19, at p.29.

This American administration did, however, subsequently exhibit a tendency towards the adherence to the principle of non-intervention. Prior to this conference, the U.S. Army of occupation had been withdrawn from Nicaragua, and on August 24, 1934, a treaty between Cuba and the United States was negotiated which removed the Platt Amendment.[773] In the same year, the U.S. forces were removed from Cuba, and in 1936 a treaty was negotiated with Panama which repealed the right of intervention.[774] By 1941 the political and financial curatorship regimes were removed from the Dominican Republic and Haiti, both these having the fetters over their sovereign powers removed.

The Latin American Republics persevered in their demands for the formulation of the non-intervention principle as a norm of Pan-American legal relations, and at the Inter-American Conference for the Maintenance of Peace, convened at Buenos Ayres in 1936, this objective was ultimately achieved. In the Additional Protocol Relative to Non-Intervention, the United States unconditionally adhered to a provision which stated:

> "The High Contracting Parties declare inadmissible the intervention of any one of them, directly or

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[772] See Stowell, E.C. "The New Deal in Intervention", 1934 (28) A.J.I.L. pp.315-319.
[773] See 153 L.N.T.S. p.369. See also Woolsey, L.H. "The New Cuban Treaty" 1934 (28) A.J.I.L. pp.530-534.
[774] General Treaty of Friendship and Cooperation, 1940 (34) A.J.I.L. Supplement, p.139. Although this treaty was signed in 1936, it was not, however, ratified until 1939. See Hyde, op. cit. Vol. 1, Part I, Para. 20, p.69.

> indirectly, and for whatever reason, in the internal and external affairs of any other of the Parties."[775]

This principle was also reinterated in the Declaration of American Principles agreed at Lima in 1938, which proclaims that:

> "...the intervention of any State in the internal or external affairs of another is inadmissible."[776]

And at the Mexico City Conference in 1945, the second principle of the Act of Chapultepec provides for:

> "...condemnation of intervention by a state in the internal or external affairs of another."[777]

In a declaration by the Foreign Ministers of the American Republics, adopted at Habana in July, 1940, the principle was agreed that any attack on the part of a non-American state against the political integrity or territorial inviolability of an American state would be construed as an act of aggression against all the American state signatories to this Declaration.[778] At Mexico City in 1945, a similar principle of collective security was pronounced, and in 1947, at Rio de Janerio, this principle was given definitive form in the Treaty of Reciprocal Assistance.[779]

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[775] See 188 L.N.T.S. p.31, at p.36.

[776] Whiteman, M.M. Digest of International Law (1965), Vol. V, p.421. In the Declaration of Lima, all the Parties affirmed their determination to maintain the negotiated principles "against all foreign intervention or activity that may threaten them." See Oppenheim, Eighth edition, op. cit. Vol. I, Para. 140, p.317.

[777] Bevans, C.I. Treaties and Other International Agreements of the United States, 1776-1949, Vol. 3, pp.1024-1027, at p.1025.

[778] The International Conference of American States, First Supplement, 1933-1940 (1940), p.360.

It is evident that such undertakings could possibly themselves lead to intervention, and would, therefore, conflict with the earlier rights won by the Latin American states. Such intervention, although of a collective nature, could ultimately lead to a repetition of the events which occurred in the recent past. Consequently, at the Ninth International Conference of American States held in Bogata, in 1948, an attempt was made to reconcile all these conflicting principles.[780]

At this location, the various American nations convened for the purpose of drafting a charter for the proposed Organization of American States (OAS). This constitutional document, to a substantial degree, codifies the pre-existing normative structure. Article 15 stipulates:

> "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements."[781]

The same document further provides that coercive measures of an economic or political character are prohibited, and that the territorial integrity of each party is absolutely inviolable, with one exception.[782]

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[779] See Fenwick, C.G. "Intervention and the Inter-American Rule of Law", 1959 (53) A.J.I.L. pp.873-876.
[780] See Ronning, C.N. Law and Politics in Inter-American Diplomacy (1963), pp.65-67.
[781] 2 U.S.T.S. Part 2, pp.2394-2485, at pp.2419-2420.

The Charter of the OAS explicitly recognized that measures taken by the regional group for the maintenance of peace and security in the hemisphere, and in accordance with existing treaties, do not constitute a violation of the principle of non-intervention.[783] Consequently, the Charter of this organization recognizes the possibility that collective intervention may be legitimate when in accordance with existing treaty rights.

Another principle which conflicts with that contained in Article 15 was stated at the Caracas meeting of the American States in February, 1954. At this gathering, a resolution was passed relating to the preservation of the political integrity of American states against international communist subversion and intervention. In this resolution, the parties at this conference declared:

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[782] Article 16 provides:

> "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another and obtain from it advantages of any kind."

Article 17 states:

> "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any ground whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized."

[783] Article XXVIII provides:

> "If the inviolability or the integrity or the sovereignty or political independence of any American State should be affected by an armed attack or by an act of aggression that is not an armed attack...or by a conflict between two or more American States, or by any other fact or situation that might endanger the peace of America, the American States, in furtherance of the principle of continental solidarity or collective self-defence, shall apply the measures and procedures established in the special treaties on the subject."

> "[T]he domination or control of the political institutions of any American state by the International communist movement, extending to this hemisphere the political system of an extra-continental power, would constitute a threat to the sovereignty and political independence of the American States, endangering the peace of America, and would call for appropriate action in accordance with existing treaties."[784]

Would the conversion of an American state to the principles of communism constitute a legitimate ground *ipso facto* for intervention? The answer to this would probably be in the negative, since the declared purpose of these collective states was to act "in accordance with existing treaties." Since the OAS Charter enshrines the principle of non-intervention in treaty form, then such intervention would be unlawful. However, this declaration is analogous in both form and content to the warning issued by Monroe to the European nations in 1822, and perhaps could represent the nascent declaration of a similar doctrine.

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[784] Chronological Collection of Documents (Washington: Pan-American Union, 1954), Document 110. See also Kane, op. cit. pp.192-193.

Despite the formulation of the non-intervention principle in these quite rigorous terms, the Pan-American principle does not exist devoid of reference to the general principle. For example, the concept of intervention itself is defined in terms of the general legal concept which has been elucidated in the works of international jurists. Possible also, the international and inalienable right of self-defence, which exists on the general plane, would prove paramount in competition with this principle.

However, these reservations notwithstanding, the Inter-American nations have attempted to erect a stricter obligation of non-intervention than exists at the general level, and therefore, in their international relations *inter se*, legal justifications for interventionary activities are more restricted. This has been the direct result of the consensus among these states to enshrine the principle in concrete treaty form to ensure its proper application vis-a-vis themselves and the United States.

XI. CONCLUSIONS.

From the exclusive perspective of doctrinal rationalization, the principle of non-intervention was the logical consequence of the formalization of the international societal structure as a community of sovereign states, which was conceived by the processes initiated by the Peace of Westphalia. Through a series of *a priori* deductions, from the tentative and embryonic rights conferred by the rudimentary natural law of nations, a number of legal rights and duties were formulated. Non-interference as a corollary of sovereignty was the resulting general duty imposed upon all members of the sovereign community.

The sole practical means to achieve the passive co-existence of these distinct and individual political units was to assure each of them an opportunity to evolve and to construct distinctive cultures, societal structures and institutions within an identifiable territory, secured by this rudimentary system of law, but also fortified by reciprocal political understanding.[785] The principles of legal equality, political independence and territorial integrity have pervaded, in one sense or another, through legal doctrine since Grotius, and are now considered the fundamental legal principles upon which international society in the twentieth century persists. Although in the modern world, absolute territorial, political or social isolationism has become increasingly difficult, the principle of non-intervention has remained as a fundamental tenet of international order.[786]

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[785] See Wright, Q. "Subversive Intervention", 1960 (54) A.J.I.L. pp.521-535, at p.522.

Although the rule of non-intervention was originally established by naturalist processes of deduction from the abstract concepts of natural law, its subsequent development, both in positivist strictures and in general state practice, has resulted in the general international consensus of the principle as a rule of modern international law. Despite the various degrees of support given to the concept by the jurists of the nineteenth and twentieth centuries, it has been generally accepted and no international jurist of repute has refuted the legal credentials of this principle.

Notwithstanding the propensities of positivist jurists, such as Phillimore, to reduce substantive international law to the level of the rubber-stamp of state practice, an essentail contribution was forthcoming from this group which assisted in the isolation of the concept. Therefore, it would not be unfair to assert that, whilst reason established the embryonic framework of the rule, the processes of synthesis of practice identified its parameters, and substantiated it as an instrinsic element of international law.

Although the substance of the rule had been identified well before the outbreak of the Second World War, the development of the principle of non-intervention has been anything other than consistent, unambigous or certain. A number of features of eighteenth and nineteenth century international society were undoubtedly responsible for this staccato evolution. In particular, it was not until the beginning of the nineteenth century that the international community was capable of differentiating between the polar extremes of an act of war and the more restrictive and limited nature of an act of intervention in the sense of twentieth century terminology.

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[786] For example, General Assembly Resolutions 2131 (XX), and 2624 (XXV).

Further, the evolution of the term "intervention" itself, in legal writings, was not necessarily in harmony with the facts of international political history. Substantial importance must be attributed to the fact that, at certain times, international state practice has varied considerably from the legal prescriptions of the international doctrinal writers. The fundamental explanation for this discrepancy is as valid today as it was in the times of earlier and different great powers.

In the equation which formulates international conduct, the influence of international law is, and always has been, persuasive, mildly coercive, and in the long term advisable, rather than compulsory. Since nations have been unwilling to submit to a rule of law which would adversely affect their decision-making capacities, this is only to be anticipated. Whether, in time, the mechanisms for legislative enactment, judicial determination and executive enforcement become centralized and more effective is primarily a political issue. Although at the moment the means by which international law influences international behaviour is sufficient for it to be generally recognized as a legal order, it must be accepted that the mere rules of non-intervention are insufficient to deter acts which are, by definition, undertaken as a means to exert pressure on the individual and independent decision-making powers of sovereign states.

Non-intervention is generally portrayed as the most efficacious means of conducting international relations. Therefore, lip-service is paid to its continued existence. Unfortunately, on the international plane, strong currents pervade which undermine the motives of nations to conform to this pattern of practice. Whether these are characterized as "national" interests, "vital" interests, necessity or self-preservation is irrelevant. Their importance is in identifying the existence of other factors in international decision-making. When these are combined with a political or ideological objective, their effects are amplified.

Unfortunately, legal imagination takes little notice of these factors, other than to occasionally define them as providing causes for exceptions to the general rule. By ignoring this separation of functions, legal doctrine has accentuated the difficulties of the situation. In effect, it therefore appears, particularly to those not involved with the functioning of international law, that non-intervention, as a principle of international law, is frequently violated. This is often assimilated to the non-functioning of international law, and the question which ultimately arises is "How can international law be "law" in the light of such frequent deviation?"

Since the formulation of this principle in the works of Vattel and Martens, state practice, as we have seen, has often been in conflict with the prescribed norm. In Europe, since the French revolution and until the initiation of the First World War, religious fraternity, monarchical overlordship, imperialism and ambition have all been pursued by interventionary acts. For example, the Holy Alliance perceived its policy of pro-monarchical and anti-liberal revolution intervention in terms of legitimacy. Non-intervention as a professed British foreign policy was motivated primarily by the desire to protect the *status quo* and the existing balance of power in its favour. Both the United States and France, at different times, asserted this policy as a defence against alien intervention within their respective spheres of influence. However, in retrospect, it would appear that these three states are culpable for the vast majority of acts of intervention throughout the nineteenth and into the early twentieth century.

Since the nineteenth century was characterized by economic and political growth, and in the friction which emerged between the so-called Old World and the New World, this was to be anticipated. As the concept of nationalism supplanted the principle of sovereign allegiance, and liberal revolutionary sentiments grew, so too did the friction between monarchical and so-called democratic states. Since the law of nations remained silent on the legitimate origins of a state, the problems created by the evolution of the international society could not be accomodated by this simple system. In particular, it appears that the principle of non-intervention could itself not accomodate the complexities of this problem.[787] Although in the twentieth century the principle of non-intervention appears more stable, and perhaps more mature, the same fundamental problems remain. This process was examplified by Oppenheim's support of intervention to redress an international imbalance of power.[788]

The essence of the admission that the principle of non-intervention could not contain the movement within humanity is an admission of the limitations of this principle. Further, it can be generally stated that the exceptions to the principle of non-intervention commonly espoused by the jurists of those eras in which the principle could be identified, are illustrations of a recognition of the futility of an absolute statement of non-intervention. Perhaps also these are reflections of the undesirability of the incorporation of such a rigid principle into an environment of such flux as is the international society.

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[787] See Carty, A. The Decay of International Law? (1986), pp.91-92.

[788] Oppenheim, L. International Law (Eighth edition, 1955), Vol. 1, Para. 136, pp.311-312.

Indeed, the development of the principle itself illustrates the relationship between state practice and the evolution of the law. The latter is essentially the reflection of the former within a framework which has generally been recognized as law.

Non-intervention as a term, has also been employed in both a legal and political sense. The legal principle can be identified through the normal processes employed for the identification and determination of legal principles. However, non-intervention in its political sense cannot be so easily classified. For example, the Monroe doctrine outlined a policy of non-intervention with political connotations which had little or no foundation in international law. Further, as American interests and influence expanded throughout Central and South America, this policy was transformed into one of blatent interventionism. Non-intervention, as an element of foreigm policy, is therefore not only a political tool, but also one subject to the flexibility of subjective interpretation. Indeed, given the economic, social and financial penetration by the United States into these regions, it is difficult to believe that such interference is anything but normal or unavoidable.[789]

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[789] Indeed, in the case of the American intervention in the Dominican Republic in 1965, U.S. President Johnston stated:

> "The American nations cannot, must not, and will not permit the establishment of another Communist government in the Western Hemisphere"

Department of State Bulletin Vol. LII, No. 1351 (1965), pp.742-748. See also Vincent, R.J. Non-Intervention and International Order (1973), p.203.

The legal principle of non-intervention and state practice in this respect have appeared to have proceeded from two fundamentally different assumptions. In doctrinal prescriptions, it has generally been asserted that each sovereign and individual state is entitled to the exercise of those rights conferred by international law, including those derived from the concept of sovereignty. However, this is not completely consistent with state practice. In general terms, states from the period preceding World War Two involved in interventionary activities have pointed to a higher justification than the law to support their actions, such as the necessity of supporting an ally, the perpetuation of dynastic legitimacy, assistance in support of fraternal political forces, whether incumbent or insurgent, the maintenance the balance of power and for the purposes of self-preservation.

Although it is, to a certain degree, true that some of these ratonales for intervention have been incorporated into international law in such a way as to legitimate such actions, it is equally evident that, in the practice of states during this period, nations have asserted that certain fundamental rights prevail over the mere rules of international law.[790]

The relevance of the historical development of the non-intervention principle prior to the Second World War is obvious. The principle which has pre-existed contemporary developments in the last four decades, appears to be tightening, although more and more reference is being made to the principle as the role of "war", in the traditional sense of the term, diminishes. Given the limitations imposed by the United Nations Charter on the employment of force, this is quite predictable. However, as one commentator has pointed out:

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[790] Lingelbach, W.E. "The Doctrine and Practice of Intervention in Europe", 1900 (16) Annals of the American Academy of Political Science, pp.1-32, at p.29.

> "It is as useless to outlaw intervention without providing a satisfactory substitute as it was to outlaw war when no satisfactory substitute was available. When the apparent "necessity" of intervention appears to outweigh any long-term advantages of preserving the principle of non-intervention, states will resort to the former."[791]

These comments are of equal application to the general system of international law and order. The principle of non-intervention serves to illustrate both sides of the argument for and against the efficacy of international law. On the one hand, critics and depricators of the international legal system, while fundamentally misconceiving the essential nature of the order, have argued that the lack of obedience or courtesy to this rule illustrates the weakness of the system. However, on the other hand, those who are familiar with its operation will be prepared to concede that the international rule of law is precarious, but this is insufficient in itself to withold the credentials of a legal system from this order. Schachter has cogently expressed the latter opinion when he stated:

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[791] Ronning, C.N. Law and Politics in Inter-American Diplomacy (1963), p.83.

> "It is true that the efficacy of [international] law is limited because the system lacks effective central authority and is characterized by vast discrepancies in the power of States...Powerful States may violate international obligations; they may do so with relative impunity or they may pay a price. But they also have a stake in stability and an acute sense of countervailing power. A decentralized legal system can operate because of the factors of self-interest and reciprocal reactions."[792]

By identifying the importance of the essential nature of the system, it becomes evident that those who advocate law and order in the international sphere cannot be forelorn.

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[792] Schacter, O. "Intervention by Armed Force in International Conflict", 1982 (178) Hague Recueil pp.160-166, at p.165.

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